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LEADING ARTICLES

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VOL. X APRIL, 1938 No. 3

COMPETITION IN THE PUBLIC UTILITY FIELDS

*I. Beverly Lake**

The channel through which the Ship of State is forever sailing in its quest for that elusive port, The Public Welfare, lies between the shores of Monopoly on the one side and those of Unrestrained Competition on the other. As we have come close enough to the shores of Monopoly to be scorched by the fiery breaths of the dragons inhabiting those regions, we have been prone to change pilots and select one or more who have steered us to the opposite shore, where we have found Free Trade to be a siren, who lures us into the clutches of Boom and Depression—the latter being sometimes known as Recession. Then we have thrown those pilots overboard with some of the crew for company and sailed off toward Monopoly again.

English and American economic history is a long story of the voyages back and forth. We are now apparently trying the method of sailing in both directions at once. While this is a bit confusing to the passengers, they have been bumped so often on first one shore and then the other that a little spin in the Whirlpool of Indecision may serve as a restorative.

The true monopoly is defined by Lord Coke[1] to be "an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." In early times they were granted by the king to a favorite courtier without reference to the public welfare, but solely to enable the courtier to live in the style to which he wished to become accustomed. These flagrant cases of exploitation of the public for the enrichment of the favored finally caused so much resentment that such grants were held contrary to the English common law and valid only when created by Parliament, which could change the common law, or when designed

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[1] 3 INST. 181.

to benefit the public.[2] Subsequently, monopolies were granted to encourage exploration, colonization and the development of England's foreign trade, the most notable example being the grant to the East India Company. Adam Smith, while regarding monopolies in the domestic trade as an unmixed evil, looked with favor upon a temporary monopoly granted to a joint stock company engaged in the development of trade with a remote and barbarous country, regarding these as in the class with grants of patents. However, he contended that such monopolies should not continue after the company became established in the trade for the reason that they led to inefficient management resulting in the inconsistency of exorbitant prices and low profits to the investor.[3]

The abuses arising from these monopolistic joint stock companies have been said to have been the cause for the suspicion with which early Americans, even more than modern ones, viewed corporations.[4] Be that as it may, monopolies were in disfavor when the American states became independent. Several of them went so far as to insert in their state constitutions provisions to the effect that monopolies are contrary to the free genius of an independent state and should not be permitted.[5] Thus, except for patents and copyrights, and a few isolated cases of toll-bridges and ferries, in early America there was a period of "dog-eat-dog" competition, resulting in the growth of a strong nation, whose traders were the despair of their rivals abroad.

Contracts Eliminating Competition

The elimination of competition by buying the competitor's business and exacting from him a promise not to compete was not permitted at early common law.[6] Such contracts in restraint of trade were regarded as injurious to the public as well as to the promisor, in that they exposed the public to high prices and poor service, and left the retiring competitor without a trade. However, it soon came about that the courts, favoring freedom of contract, sustained contracts in restraint of trade if reasonable as to territorial limits, necessary for the protection of the promisee, and supported by a valuable consideration. This seems to have been the state of the English common law at the time it was brought to America.

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[2] 7 Bacon, Abridgment 22–23.

[3] Adam Smith, The Wealth of Nations (3d ed. 1784) bk. V., c. 1, pp. 143–44.

[4] Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 19.

[5] Ark. Const. art. II, § 19; N. C. Const. art. I, § 31; Tenn. Const. art. 1, § 22; Tex. Const. art. I, § 26; Wash. Const. art. XII, § 22.

[6] White, C. J., in Standard Oil Co. v. U. S., 221 U. S. 1 (1911).

Contracts in restraint of trade were, and are, viewed with suspicion, but if reasonable and not detrimental to the public, they have generally been sustained in America.[7] "Public interest is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."[8] Nevertheless, as Judge Shiras said, "Competition free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits against the evils, the law of competition remains as a controlling element in the business world."[9]

Early America regarded competition as particularly desirable in the public service businesses, and franchises were often granted to competing gas and transportation companies. In a well known case[10] the charter of one gas company expressly prohibited it from entering into any contract limiting its right to exercise the powers conferred upon it by the state. The company, nevertheless, entered into a contract with a rival gas company by which the two sought to end their competition. An agent, who brought the two together in the agreement, sued for compensation for his labors. In denying his right to recover, Chief Justice Fuller was not content to rely upon the above provision in the chartering statute limiting expressly the capacity of the company to make such a contract, but proceeded to place the decision upon the broad ground that due to the public nature of the business any contract restraining competition was void as against public policy. He said: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. . . . Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere

[7]Oregon Steam Nav. Co. v. Winsor, 87 U. S. 64 (1874); Fowle v. Park, 131 U. S. 88 (1889); Miss. Power Co. v. City of Starkville, 4 F. Supp. 833 (N. D. Miss. 1932); State v. Edward Hines L'br. Co., 150 Miss. 1, 115 So. 598 (1928); Plaza Amusement Co. v. Rothenburg, 159 Miss. 800, 131 So. 350 (1930).

[8]Fuller, C. J., in Gibbs v. Consol. Gas Co. of Baltimore, 130 U. S. 396, 409 (1889).

[9]Shiras, Dist. J., dissenting, in U. S. v. Trans-Missouri Freight Ass'n, 58 Fed. 58, 94 (C. C. A. 8th, 1893).

[10]Gibbs v. Consol. Gas Co. of Baltimore, 130 U. S. 396 (1889).

with the freedom of contract, yet in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy."[11] Previously, Justice Miller had said: "Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."[12]

In *Chicago Gas-Light & Coke Co. v. People's Gas-Light & Coke Co.*[13] the Chicago Company was granted a franchise to sell gas in Chicago, which franchise was exclusive for ten years. Thereafter, the People's Company was granted a franchise to take effect at the end of the ten year period. Each franchise was city-wide. The companies by contract divided the city between themselves, each agreeing not to sell gas in the other's territory for one hundred years. The Chicago Company, after twenty-four years of observance of the contract, prepared to violate it and invade the territory of the People's Company, which brought suit for specific performance of the contract. Though there was no evidence whatever of any fault to be found with the service the People's Company was, and had been for twenty-four years, rendering the inhabitants of its territory, and no evidence of any demand for the proposed reoccupation by the Chicago Company, the court denied specific performance on the ground that the contract was void, saying: "Inasmuch, therefore, as by the terms of its charter the appellant owed a duty to the public, it could not avoid the performance of that duty by a contract with another corporation."[14]

That a contract depriving the public of services to which it is entitled under a previous franchise contract is invalid in a suit brought on behalf of the public is, of course, correct.[15] However,

[11]130 U. S. at 408, citing W. Va. Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600 (1883); Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160 (1880).

[12]Thomas v. West Jersey R. R. Co., 101 U. S. 71, 83 (1879), quoted with approval in Taylor v. Santa Fe, *etc.*, Ry. Co., 38 N. M. 457, 34 P. (2d) 1102, 1104 (1934).

[13]121 Ill. 530, 13 N. E. 169 (1887).

[14]13 N. E. at 172.

[15]Thomas v. Railroad Co., 101 U. S. 83 (1879); Railway Co. v. Mining Co., 68 Ill. 489 (1873).

the public made no complaint in the *Chicago* case. It was served adequately we must presume. The granting of two franchises shows that the matter of supplying gas was not regarded by the legislature as anything approaching personal service. All the legislature and the consumers were concerned about was an adequate supply of gas at reasonable rates. It is, however, obvious that originally the legislature desired competition, thinking that competition would result in better and more courteous service at lower prices. This theory was undoubtedly sound at that time, there being no commission in existence with power to regulate rates. It is submitted that it is sound under commission control as well, though disadvantages in other respects may make competition undesirable in certain businesses. Since the policy of the sovereign was to protect the public by fostering competition in the business of supplying gas, it is clear that the state could have compelled the companies to give city-wide service in competition.[16] It is possible that an individual consumer might by showing inadequacy of the People's Company's service have compelled the Chicago Company to supply him with gas. However, the state and the consumers had acquiesced in the territorial agreement for twenty-four years and still acquiesced therein. The Chicago Company was permitted to break its contract for no other reason than that it did not choose to abide by it any longer. Under these circumstances the court's rushing to the defense of the public seems unnecessary.

With the adoption of the commission idea in public utility regulation, there developed a more friendly attitude toward territorial agreements between utilities rendering the same service. Territorial monopoly avoids duplication of equipment in many respects. For example, the *Chicago Gas* case resulted in two sets of gas mains all over the city where one would have been enough. Similarly, competition in the same field and territory means some duplication in personnel. The elimination of these duplications and the giving to one company of all the business, results in a lower rate base, lower operating cost per unit of service, higher gross income, and the consequent possibility of a reduced rate to the consumer without reducing the return to the company below a reasonable figure. The theory is that the commission will hold the monopolist to these low rates, resulting in lower rates than competition alone or competition plus regulation could give. Further-

[16]Huntington Tel. Co. v. Pub. Util. Comm., 118 Conn. 71, 170 Atl. 679 (1934); Ill. Commerce Comm. v. Chicago Rys., 362 Ill. 559, 1 N. E. (2d) 65 (1936); Bell Tel. Co. of Pa. v. Pub. Serv. Comm., 103 Pa. Super. Ct. 347, 158 Atl. 186 (1931); Pa. P. & L. Co. v. Pub. Serv. Comm., 112 Pa. Super. Ct. 500, 171 Atl. 412 (1934); *Re* Central Union Tel. Co., P. U. R. 1932A 465 (Wis. Pub. Serv. Comm.).

more, it is thought that the supervising commission will procure for the consumer more efficient and courteous service than the consumer would receive under the competitive system. Given a company personnel taking seriously the name "public service company," or given a commission personnel which sees all, hears all, and can prophesy with mathematical accuracy the many and variable future events which determine how low a rate will yield a fair return, the public utility monopoly is the happy solution to all the problems in the field. However, such directors and commissioners are not met on every hand.

The leading case sustaining territorial agreements comes from Massachusetts.[17] Here two electric companies holding city-wide franchises in Boston, divided the territory, each taking over the other's customers in its area. A former customer of the company which retired from his portion of the city received satisfactory service from the remaining company after the agreement. Nevertheless, he instituted proceedings before the commission to compel the first company to serve him. The commission declined to so order as the public interest would not be served but would be endangered by compelling a violation of the agreement. The court sustained the commission upon the grounds suggested above. This decision is, of course, sound. To have held otherwise would have opened the door to suits brought by people with a mania for litigation or by others suing solely to get a "nuisance-value" settlement. The plaintiff was not hurt by the territorial agreement and the public was found by the commission to be unhurt, if not actually helped. This case has been followed in recent years with the spread of the commission system.[18]

In some states a territorial agreement is not enforceable unless approved by the commission as being in the public interest.[19] While the commissions are generally liberal in approving such agreements, this rule seems a bit too strict. The company should not be allowed to break its contract at will, nor should individuals served adequately under the arrangement be encouraged to attack it in nuisance suits. It seems reasonable to adopt here the rule prevailing generally that contracts in reasonable restraint of trade are valid, the primary test of reasonableness being not whether the

[17]Weld v. Bd. of Gas & Elec. Light Com'rs, 197 Mass. 556, 84 N. E. 101 (1908).

[18]Palmyra Tel. Co. v. Modesto Tel. Co., 336 Ill. 158, 167 N. E. 860 (1929); Bell Tel. Co. of Pa. v. Pub. Serv. Comm., 103 Pa. Super. Ct. 347, 158 Atl. 186 (1931); Railroad Comm. v. Rau, 45 S. W. (2d) 413 (Tex. Civ. App. 1931); (1913) 26 HARV. L. REV. 761.

[19]*Re* Pub. Serv. Co., P. U. R. 1928B 574 (Colo. Pub. Util. Comm.); Citizens Mut. Tel. & Tel. Co. v. Pub. Serv. Comm., P. U. R. 1928D 578 (Pa. Pub. Serv. Comm.); Meadville Tel. Co. v. Petroleum Tel. Co., P. U. R. 1931A 268 (Pa. Pub. Serv. Comm.).

public will be helped by the agreement, but whether there is any substantial harm resulting to the public from it.[20]

Protection to the public is afforded by the commission's undoubted power to compel either company to reënter and serve the relinquished territory whenever public interest requires such reëntry. Thus, in spite of such an agreement, a telephone company was allowed to reënter the relinquished area to serve residents thereof more closely connected commercially with its part of the territory.[21] On the other hand monopolies are inherently dangerous. Commission policing, which at best is spasmodic, will not furnish the incentive to courteous service nor to vigilance in discovery of improved and economical methods that is constantly supplied by a strong competitor. Therefore, while it is unreasonable to require a definite finding of public good before a territorial agreement will be enforced, it is reasonable for the commission to require the companies to prove from time to time that the agreement is not working to the disadvantage of the public. The difference between proof of advantage and proof of no disadvantage is substantial. The public's right to be served adequately, courteously and reasonably is paramount. Where it is being so served the agreement should be upheld, but frequent checks should be made. Contracts fairly made should be enforced unless the public is actually injured thereby. Forcing a company to reënter an adequately served area it does not want to reënter or permitting it to reënter such area in violation of its express contract is justifiable only where the public necessity in fact requires it.[22] Whether a third person or company not barred by contract should be allowed to enter the area in absence of such clear public need is a different question. Of course, the states are free to adopt either the monopolistic or the competitive plan, and courts and commissions cannot permit and enforce agreements clearly forbidden by the legislature, but unless there is a clear legislative declaration involved, such contracts should be enforceable between the parties.[23]

There are many other ways by which competing utilities voluntarily—at least on one side—eliminate competition. Some of these are purchase and sale of all properties, purchase of a controlling interest in a rival company, interlocking directorates, merger, and acquisition of both operating companies by a holding company. A discussion of elimination of competition by absorption is beyond the scope of this paper.

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[20]Railroad Comm. v. Rau, 45 S. W. (2d) 413 (Tex. Civ. App. 1931).

[21]Jones v. Sou. New England Tel. Co., P. U. R. 1932D 454 (Conn. Pub. Util. Comm.).

[22]Meadville Tel. Co. v. Petroleum Tel. Co., P. U. R. 1931A 268 (Pa. Pub. Serv. Comm.).

[23]See Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353 (1931).

With our characteristic enthusiasm we have swung to the extreme of regarding competition between utilities as positively harmful. The North Dakota commission[24] in lamenting its lack of power to prevent competition between power companies quoted from the Montana commission[25] as follows: "It has been conclusively demonstrated in almost every small community where the experiment has been tried, that the grant of franchises to competing public utilities is wrong in principle and invariably results in unsatisfactory service. Competition has long ceased to be potent as a regulatory factor in public utility operations. Where it was relied upon, it proved to be bad in the long run for consumers of utility service, as it often meant duplication of facilities in a field not large enough to support more than one company. The usual outcome of this was consolidation, followed by recoupment, by means of high rates, of losses due to competition. It has taken a long time for the public to understand that competition as a regulator of charges in the public utility industry is a failure, and even now the fact is not appreciated by casual observers." Similar views have been expressed by other commissions.[26]

At the risk of being considered the most casual of casual observers, it is respectfully submitted that this is an overstatement of the case for monopoly. That competition unrestrained has objectionable results is too clear for argument. Nevertheless, the casual observer is impressed by the remarkable improvement in railroad passenger service in the past few years. Long delayed trains were once so common that when they actually ran on time the public was inconvenienced by the necessity for a wild dash to the station. "The public be damned" attitude was reflected in numerous small but irritating ways. Trains running on schedule, trains giving fast through service, porters and other employees exhibiting solicitude for the comfort of passengers riding in air-conditioned, cinderless coaches, and, the pick-up and delivery service in freight departments may all be due to the vigilance of the commissions or to a great reform in railroad personnel, but the casual observer does have a slight suspicion that competition offered by busses and trucks may have supplied some part of the incentive to improve. He has also heard that since the advent of T. V. A. the private electric companies have been diligent in building new lines to previously unserved areas and have reduced rates voluntarily with the result that volume has so increased that lower rates have

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[24]*Re* Hughes Elec. Co., P. U. R. 1927C 15 (N. D. Bd. R. R. Com'rs).

[25]Pub. Serv. Comm. v. Blue Flame Gas Co., P. U. R. 1926D 314, 319 (Mont. Pub. Serv. Comm.).

[26]*In re* Investigation Milwaukee Lighting Rates, 9 Wis. R. R. Comm. 54 (1912); Report of Georgia commission to the legislature, quoted in *Re* Hughes Elec. Co., P. U. R. 1927C 15 (N. D. Bd. R. R. Com'rs).

yielded higher dividends. While it is too early to determine the ultimate effect of T. V. A., and while there are many reasons to doubt the wisdom of the Federal Government's venture into the power field, it still appears to the casual observer that competition does not always mean exorbitant rates, nor does it always reduce earnings.

"It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted by legislation to restrain their operations and to protect the public against their exactions."[27] It is also true that no one enjoys competition any more when it is not born of legislation. Yet competition in the ordinary businesses is an incentive to lower prices, better service, and good management so as to pay good dividends. It is submitted that many public utilities are no exception to this rule. In some cases, as the telephone field, for example, competition is a barrier to easy communication. In others, it may produce rates somewhat higher. Theoretically, it does so in all cases or else the companies do not earn a fair return, and theoretically the commission-regulated monopoly, because of increased volume, can operate on a lower unit-of-service charge, and will be held to that charge by the commission. The difficulty lies in the impossibility of a board of human beings finding the lowest practicable rate. Furthermore, let us suppose that competition causes higher rates to the consumer. If it results in more courteous and attentive service and a diligent search for improved methods, may not the benefits at least balance the detriment of higher rates?

The real objection to competition is that it causes rate wars, and ultimately destroys itself. It is said that it inevitably becomes cutthroat competition and prices are slashed so that finally all competitors are destroyed save one, who is, himself, so weakened by his wounds that he soon sickens and dies, leaving the public without any servant in the particular field. No new company, the argument goes, will take the place left by the dead gladiators for fear of a similar fate. This, in view of the remarkable growth of American industry, seems an unnecessarily gloomy view. In spite of competition the American people have never been long without a service they have really wanted, and prices have tended toward reasonableness. The road we have travelled is marked by the bones of those who could not survive the rigors of competition. It would be better if all could prosper. But, the nation has moved. The standard of living has advanced. While competition does weed out those who cannot give good service at reasonable prices, the weeding is often the result of improvements and discoveries fostered by the sharp conflicts in competition.

[27]Harlan, J., in Northern Securities Co. v. U. S., 193 U. S. 197, 351 (1904).

If we let ourselves believe that competition and suicidal rate wars have been synonymous in the history of utilities, and not only the investors but the public have lost thereby, it does not follow that the only alternative is to turn to monopoly. The theory that competition between utilities must necessarily be destructive, is as out-of-date as the still older theory that the public cannot be assured of adequate service without competition between them. If a competing utility is admitted to the field, a rate war is not the inevitable consequence. A public utility has no constitutional right to engage in a rate war with its rival.[28] The competitor may be required to maintain certain reasonable minimum rates.[29] Since the *Nebbia* case[30] it is clear that the states have the power to regulate prices in these fields so as to prevent unreasonably low prices as well as unreasonably high prices. Whatever may once have been the case, there is now in the hands of the states an effective weapon against cutthroat competition. It should be used to preserve the benefits and eliminate the greatest evil resulting from competition. Competition alone is not a reliable regulator of utilities, but commission-governed competition has some advantages over commission-governed monopoly. At least, the case for monopoly is not clear beyond argument.

Constitutionality of Statutory Restrictions upon the Right to Enter Business

In the *Case of Monopolies*[31] it was held that the grant of a monopoly in the manufacture and sale of playing cards by the Crown as a matter of favor was contrary to the common law of England and void. The case was a struggle between the Crown and the People, and did not limit the power of Parliament to grant monopolies, since Parliament could change the common law.[32] This power of Parliament passed to the states, and, except as limited by the state constitutions, to the state legislatures. Prior to the adoption of the Civil War Amendments, it was never supposed that anything in the United States Constitution deprived the state legislatures of the power to grant monopolies in any intrastate trade.

In the *Slaughter-House Cases*[33] the power of the Louisiana legislature to grant a slaughter-house monopoly in the city of New Orleans was questioned. The statute clearly granted to certain

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[28]Nebbia v. New York, 291 U. S. 502 (1934); Town of Mapleton v. Iowa Pub. Serv. Co., 209 Iowa 400, 223 N. W. 476 (1929).

[29]See Mississippi Valley Barge Line Co. v. U. S., 292 U. S. 282 (1934); *In re* Street Railway Rates, P. U. R. 1921E 13 (Pub. Util. Comm. of D. C.).

[30]291 U. S. 502 (1934).

[31]11 Co. Rep. 84b, 77 Eng. Rep. 1260 (1601).

[32]See Miller, J., in Slaughter-House Cases, 83 U. S. 36 (1873).

[33]*Ibid.*

persons a monopoly, but provided that any butcher might slaughter his animals in the slaughter-house of the monopolists by paying a reasonable fee fixed by statute. The Court was sharply divided. The majority, with Mr. Justice Miller as their spokesman, held that the Fourteenth Amendment was enacted for the protection of the freed negroes, and while it was not limited in its application to them, it did not place the states in a subordinate position, but left them free to exercise their police power; that is, to make reasonable regulation of trades and businesses so as to protect the public health, morals, safety, and welfare. The majority then found that the granting of the monopoly was a reasonable exercise of the state's undoubted power to regulate the place and manner of slaughtering animals for food. The minority wrote separate opinions, but agreed that monopolies might be granted in those businesses which were not a matter of individual right, but required a permit or franchise from the state, such as the businesses of ferries, toll-bridges and toll-roads. Nevertheless, they contended, after reviewing the struggle of the English people to free themselves from monopolies, that the right to engage in "the ordinary trades or callings of life" was an inherent right in the individual citizen and the state could not deprive him of this right by an exclusive grant to another since the Fourteenth Amendment. Subsequently, Louisiana repealed the exclusive feature of the charter, and the Court held without a dissenting vote, though there were two specially concurring opinions, that the legislature could not barter away the police power of the state and so a subsequent legislature could, under that power, repeal the monopolistic part of the slaughter-house charter.[34] These cases, then, establish that in a business affecting the public health and safety, the state is free to grant a monopoly if it thinks that to do so is the proper way to safeguard the public health, and when later it believes that competition is the better safeguard, the state may break the monopoly though the term for which it was granted has not expired.

Thereafter, the Court said that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure,[35] but this liberty may be qualified by restrictions applying equally to others of like age, sex, and condition.[36] The latter case sustained the now unquestioned right of the state to require certain qualifications to be shown before a license to practice medicine is granted. The Court recognized the right of the state to make regulations it thinks will protect the public against ignorance, fraud, and incapacity, such reg-

[34]Butchers' Union, *etc.*, Co. v. Crescent City, *etc.*, Co., 111 U. S. 746 (1883).
[35]Allgeyer v. Louisiana, 165 U. S. 578 (1896).
[36]Dent v. W. Va., 129 U. S. 114 (1888).

ulations being reasonable. However, the state may not in the guise of protection of the public arbitrarily prohibit lawful occupations or impose unreasonable restrictions upon the right to engage therein.[37]

In upholding a New York statute requiring carriers of passengers for hire by motor vehicle, except those under the supervision of the Public Service Commission, to carry liability insurance, the Court[38] reaffirmed the well recognized principle: "The streets belong to the public, and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature deems proper." It was admitted in the opinions of Justices Field and Bradley in the *Slaughter-House Cases*, that the right to use the public roads as a place of business and to carry thereon for hire is not one of the "ordinary callings," and so the Fourteenth Amendment does not prohibit the state from granting a monopoly in such business. Thus the state may deny to a common carrier the right to use its highways unless after a hearing the commission finds that public convenience and necessity requires the proposed service.[39]

While the state may not as a condition precedent to the right to use its highways require that a private carrier for hire assume the duties and in effect become a common carrier,[40] the state may limit the size and loads carried by trucks, though private carriers, so as to prevent inconvenience to the public by inordinate and dangerous use of the highways and so as to foster a fair distribution of traffic to the end that all necessary facilities be maintained for the service of the public.[41] Further, the state may require any private carrier using its roads to obtain a permit, and may refuse to grant such permit if the proposed operation will impair the efficient service of any authorized common carrier then adequately serving the same territory, and may as a condition to the granting of the permit require the private carrier to charge rates not less than those charged by the common carriers for substantially the same service.[42] In the latter case the Court said: ". . . during recent years the unregulated use of the highways of the state by a vast and constantly growing number of private carriers has had the effect of greatly decreasing the freight which would be carried

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[37]Burns Baking Co. v. Bryan, 264 U. S. 504 (1923).
[38]Packard v. Banton, 264 U. S. 140, 144 (1923).
[39]Stanley v. Pub. Util. Comm., 295 U. S. 76 (1934).
[40]Mich. Pub. Util. Comm. v. Duke, 266 U. S. 570 (1924); Frost Trucking Co. v. R. R. Comm., 271 U. S. 583 (1925); Smith v. Cahoon, 283 U. S. 553 (1930).
[41]Sproles v. Binford, 286 U. S. 374 (1931).
[42]Stephenson v. Binford, 287 U. S. 251 (1932).

by railroads within the state, and, in consequence, adding to the burden upon the highways. Certainly, the removal or amelioration of that burden, with its resulting injury to the highways, interference with their primary use, danger, and inconvenience, is a legitimate subject for the exercise of the state legislative power."[43]

The state's power to restrict the use of its highways by carriers for hire is not absolute, but must be exercised reasonably and without discrimination. Thus, where the statute required a certificate of convenience and necessity of private carriers between fixed termini, but exempted from its requirements common carriers engaged exclusively in transporting farm products or seafoods, the statute was held to be void for discrimination.[44] Had the statute merely exempted trucks of those hauling farm products still owned by the producer, it would have been all right, as this was held to be a reasonable basis for classification.[45] Likewise, it is not a violation of the equal protection clause to grant a certificate as a matter of right to a carrier already in the field when the statute is passed, and require those who would enter thereafter to show that public convenience and necessity requires the service they propose to render.[46]

The Court held that an exclusive franchise to supply gas or water through pipes laid in the streets may be granted.[47] The Court said that the privilege of laying pipes in the streets or highways was not a natural right, but could be granted by the state upon such terms as it saw fit, to such persons as it chose. Likewise, the right to string wires over or under streets for the carrying of messages or the distribution of electric power is not a natural right, but one dependent upon the favor of the state and so exclusive grants are permissible. Railroads and street railways were among the first businesses to be regarded as subject to exclusive grants. An Oklahoma statute requiring a certificate of public convenience and necessity before engaging in the business of ginning cotton was held to be valid.[48]

However, in a relatively recent case[49] the Court held that the state of Oklahoma could not require a finding of public convenience

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[43]*Id.* at 271.

[44]Smith v. Cahoon, 283 U. S. 553 (1930).

[45]Aero Mayflower Transit Co. v. Ga. Pub. Serv. Comm., 295 U. S. 285 (1934).

[46]Bradley v. Pub. Util. Comm., 289 U. S. 92 (1932).

[47]New Orleans Gaslight Co. v. Louisiana Light, *etc.*, Co., 115 U. S. 650 (1885); New Orleans Waterworks Co. v. Rivers, 115 U. S. 674 (1885); Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683 (1885).

[48]Frost v. Corp. Comm., 278 U. S. 515 (1928).

[49]New State Ice Co. v. Liebmann, 285 U. S. 262 (1931).

and necessity as a condition precedent to the issuing of a license to engage in the business of manufacturing, selling or distributing ice. The majority of the Court, through Mr. Justice Sutherland, said:[50] "Plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment." The majority recognized the importance of the ice business in Oklahoma, but said it was no more important than the businesses of supplying clothing, shoes and food, which could not be so regulated. In a strong dissenting opinion, Mr. Justice Brandeis said:[51] "It is urged specifically that manufacturing ice for sale and distribution is a common calling; and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice-manufacturing business as a common calling is difficult, so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. The slaughtering of cattle had been a common calling in New Orleans before the monopoly sustained in the *Slaughter-House Cases*[52] . . . was created by the Legislature. Prior to the Eighteenth Amendment selling liquor was a common calling, but this Court held it to be consistent with due process for a state to abolish the calling[53] . . . or to establish a system limiting the number of licenses.[54] . . . Every citizen has the right to navigate a river or a lake and may even carry others thereon for hire. But the ferry privilege may be made exclusive in order that the patronage may be sufficient to justify maintaining the ferry service."[55]

Two years after the *Liebmann* case came the *Nebbia* case,[56] sustaining the New York statute regulating the price of milk so as to prevent price wars impoverishing the dairy farmers and thus making it difficult for them to maintain the proper standards of purity. While the *Nebbia* case did not involve the denial to anyone of the right to engage in the milk business, the opinion is most liberal as to the extent of the state's police power with reference to competition in what was once considered "an ordinary calling." Mr. Justice Roberts, for the majority, said:[57] "The Constitution

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[50]285 U. S. at 278.
[51]*Id.* at 303.
[52]83 U. S. 36 (1873).
[53]Citing Bartemeyer v. Iowa, 85 U. S. 129 (1873); Mugler v. Kansas, 123 U. S. 623 (1887).
[54]Citing Crowley v. Christensen, 137 U. S. 86 (1890).
[55]Citing Conway v. Taylor's Ex'rs., 66 U. S. 603 (1861).
[56]Nebbia v. New York, 291 U. S. 502 (1934).
[57]*Id.* at 527–28.

does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. . . . The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted statutes having the effect have been held inoffensive to the constitutional guarantees. . . . So far as the requirement of due process is concerned, and in absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider nor determine.'[58] . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise."

The *Nebbia* case seems broad enough to overrule the *Liebmann* case. It apparently ends the reign of "Business Affected with a Public Interest" as the test of the constitutionality of price fixing laws. It leaves the state free to adopt its own economic philosophy, whether that be monopolistic or competitive. The police power, it says, is broad enough to permit any state restriction upon the right to do business except such as is arbitrary or discriminatory. It is certainly closer to the opinion of Justice Brandeis in the *Liebmann* case than to that of the majority. Yet, the Court is not opening the door to any and all restrictions the state may see fit to impose. The police power is not unlimited. There must still be a reasonable necessity for the restriction and there must be some reasonable hope that it will produce the desired result. Different businesses still require different treatment, and while every business is subject to some degree of regulation, not every business is subject to a limitation upon the right to enter it. While no judge contends that he has the right to hold legislation unconsti-

[58]Citing Northern Securities Co. v. U. S., 193 U. S. 197 (1903).

tutional simply because he believes it to be a bad economic policy, so long as the validity of a restriction depends upon its reasonableness, the economic backgrounds of the judges and their views as to the wisdom of the policy sought to be advanced by the statute will continue to govern close cases. It is but human to regard as unreasonable economic views we do not entertain, and to try to find some reason to hold unconstitutional statutes we view with apprehension, or to search for some plausible argument to warrant upholding a statute we think desirable.

To deny a man the right to engage in a business is a far greater restriction upon his liberty than to deny him the right to charge in that business the prices he sees fit to charge. Competition is always unpleasant to those in the field and especially so in times of depression. Hence, it is not at all surprising that the existing ice plant operators in Oklahoma favored a statute to keep others out of the trade. Such a feeling among existing operators is certainly little evidence of the reasonableness of the statute, though Mr. Justice Brandeis seemed to attach importance to it. The great danger in embarking upon a policy of protecting existing operators lies in the fact that all fields seem overcrowded to those in them, and it is easy for a lobby of existing operators to so convince a legislature. The depression of recent years has greatly increased the tendency of legislators to enact laws to protect groups under the guise of protecting the public. Organized minorities employing lobbyists are increasingly effective and increasingly a source of danger. While the wisdom of restricting competition is primarily for the legislature, the sole authority for such legislation is the police power—the power to protect the public. What the public needs require is primarily for the legislature to determine. With the wisdom of its determination the courts are not, of course, concerned, but to come within the limits of reasonableness, restrictions upon the right to enter a business, which is not operated on public property or does not have extraordinary powers, such as that of eminent domain, must be fairly connected with the advancement of the public good as distinguished from the good of the existing operators of the business.

Legislatures are prone to stampede to the protective theory of government regulation of business, especially under the encouragement of lobbyists. It is to be hoped that soon the electorate and then the legislators will remember that American business grew most rapidly and the standard of living of the American people advanced faster when businessmen did not look to the Capitol for protection from competition, but relied upon their own abilities and initiative. Competition can be ruthless and dishonest. It can also be fair. The history of America seems to teach that

fair competition is advantageous to the public and to the businessman. Legislation to eliminate unfair competition is sound surgery. To eliminate competition altogether is, in most businesses, comparable to taking out an infected appendix with an axe.

It is, of course, well settled that a state cannot deny the right to enter the state for the purpose of doing an interstate business on the ground that public convenience and necessity does not require the service. Thus a common carrier may transport passengers and goods interstate though the state objects.[59] The state can impose reasonable regulations in the interest of safety and to avoid traffic congestion, and may charge a reasonable license tax for the use of its highways, but may not burden such commerce unreasonably nor regulate the right to engage in it.[60] However, Congress may, and does, regulate interstate commerce to the extent of requiring certificates of convenience and necessity for railroads, motor vehicles, and other types of communication and transportation.[61]

The state constitution may provide an obstacle to statutes limiting competition. A not infrequent provision, in the older states especially, is to the effect that perpetuities and monopolies are contrary to the genius of a free state and ought not to be granted.[62] However, statutes requiring certificates of public convenience and necessity before entering a public service business, the rates and services of which are subject to regulation by the state utilities commission are held not to violate such provisions. Some of the decisions are placed upon the ground that the business in question uses the public streets and highways and so is not "an ordinary calling."[63] Others hold that there is no monopoly in the true sense where the state retains the power to grant a competing certificate when public convenience and necessity requires that such be done.[64]

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[59]Buck v. Kuykendall, 267 U. S. 307 (1925); Bush & Sons v. Malloy, 267 U. S. 317 (1925).

[60]Clark v. Poor, 274 U. S. 554 (1926); Cannonball Transp. Co. v. American Stages, 53 F. (2d) 1051 (S. D. Ohio 1931).

[61]Railroads and pipe lines: Interstate Commerce Act, par. 18, § 1, 49 U.S.C.A. § 1 (1926); Transmission of messages by wire or wireless: 48 STAT. 1075 (1934), 47 U.S.C.A. § 214 (Supp. 1936); Common carriers by motor vehicle: 49 STAT. 551 (1935), 49 U.S.C.A. § 306 (Supp. 1936).

[62]ARK. CONST. art. II, § 19; N. C. CONST. art. I, § 31; TENN. CONST. art. I, § 22; TEX. CONST. art. I, § 26; WASH. CONST. art. XII, § 22.

[63]Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1027, 130 So. 587 (1930); Consol. Coach Corp. v. Ky. River Coach Co., 249 Ky. 65, 60 S. W. (2d) 127 (1933); State v. Mo. Util. Co., 331 Mo. 337, 53 S. W. (2d) 394 (1932).

[64]Lewis v. Nashville Gas & Heating Co., 162 Tenn. 268, 40 S. W. (2d) 409 (1931); Holston River Elec. Co. v. Hydro Elec. Corp., 17 Tenn. App. 122, 66 S. W. (2d) 217 (1933); Fink v. City of Clarendon, 282 S. W. 912 (Tex. Civ. App. 1926); Gill v. City of Dallas, 209 S. W. 209 (Tex. Civ. App. 1919); State v. Inland Forwarding Corp., 164 Wash. 412, 2 P. (2d) 888 (1931).

In upholding the right of the possessor of a ferry franchise to enjoin a competing ferry without a franchise, Chief Justice Ruffin, for the North Carolina court,[65] said: "The reason for this, as given by Mr. Blackstone, is, that the owner of a ferry is bound to the public to keep it in repair and readiness for the ease of the citizens; and that he cannot do, if his franchise may be invaded or if the income of the ferry may be curtailed by diverting passengers by means of a rival unauthorized establishment of a like kind. . . . For no person could be expected to serve the public by bestowing his time, labor, and money in establishing a ferry or erecting a bridge, if its value could be immediately destroyed by the caprice or malice of private persons in adopting means of drawing away the custom to some establishment of their own. It is, then, truly the interest of the public, as well as an instance of the private justice due an individual, that the public grant of franchises of this kind should be protected by being held to be exclusive in the grantee, unless legally and duly ordered otherwise by the public authorities." This is the strongest part of the argument in favor of prohibiting competition in public service businesses. It does not seem sound. Certainly in "ordinary callings" men have not feared to venture their capital and efforts in developing a new business simply because their success would be an encouragement to others to compete with them. Inns have from time immemorial been required to keep themselves in readiness to serve all who apply, yet there is no dearth of hotels, though usually one opening a hotel knows he is subject to competition. While the state has the power to grant an exclusive franchise to carry for hire upon navigable waters, a franchise should not be deemed exclusive unless clearly so expressed. The reason for the modern public convenience and necessity statutes is that there are too many people willing to run the very risks which Chief Justice Ruffin thought would keep everyone out of the field. Nevertheless, the states have consistently refused to regard the denial of the right to engage in a public service business in absence of public convenience and necessity for the proposed service as being a violation of the state constitutions.

Public Convenience and Necessity

In General

As a condition precedent to the right to engage in a public utility business, most, if not all, the states require an application to the utilities commission for a certificate, which the commission is to grant only upon a finding by it that public convenience and necessity requires the proposed service. Vermont calls these

[65]Smith v. Harkins, 38 N. C. 613 (1845).

"public good" certificates.[66] The Vermont terminology seems more accurate than the name "certificate of public convenience and necessity." All that is meant by either term is that the proposed service will advance the public welfare.

Obviously, the word "necessity" in these statutes is not to be taken literally. If it were so meant, the word "convenience" would be surplusage, for every necessary thing is at least convenient to have. Few of the services, which make living in our modern world comfortable, are actually indispensable and obviously we could not say that any newly discovered service is indispensable for we have, by hypothesis, always done without it. So, it is well settled that an applicant for a certificate need not prove that the public cannot get along if he is not permitted to serve it.[67] On the other hand it is clearly not enough that the applicant's service would be mildly convenient.[68] The phrase is taken as a unit and the thing required lies somewhere between the extremes of the indispensable and the merely convenient.[69] It has been said that both necessity and convenience must be shown,[70] but, clearly, what is meant is that neither is to be shown, but a rather indefinite something between the two.

The phrase includes any highly important improvement.[71] The Oklahoma court said: "Necessity means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated."[72] Such a service is certainly a public convenience and necessity, but so may be one not enjoyed elsewhere, but conducive to the development of the community as a whole. Probably the best that can be done by way of a general definition of the thing to be required is to adopt the words of the Illinois court: "Any improvement which is highly important to the public

[66]Appleyard v. Burlington Traction Co., P. U. R. 1927D 692 (Vt. Pub. Serv. Comm.).

[67]Red Star Transp. Co. v. Red Dot Coach Lines, 220 Ky. 424, 295 S. W. 419 (1927); North Bend Stage Line, Inc. v. Denny, 153 Wash. 480, 279 Pac. 753 (1929); North Bend Stage Line, Inc. v. Dept. of Pub. Wks., 162 Wash. 46, 297 Pac. 780 (1931).

[68]Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1631, 131 So. 777 (1931); Cooper v. McWilliams, 221 Ky. 320, 298 S. W. 961 (1927); Canton, *etc.*, Coach Co. v. Pub. Util. Comm., 123 Ohio St. 127, 174 N. E. 244 (1930); R. R. Comm. v. Shupee, 57 S. W. (2d) 295 (Tex. Civ. App. 1933).

[69]Yazoo, *etc.*, R. R. Co. v. La. Pub. Serv. Comm., 170 La. 441, 128 So. 39 (1930).

[70]Cooper v. McWilliams, 221 Ky. 320, 298 S. W. 961 (1927); R. R. Comm. v. Shupee, 57 S. W. (2d) 295 (Tex. Civ. App. 1933).

[71]San Diego, *etc.*, Ferry Co. v. R. R. Comm. of Cal., 210 Cal. 504, 292 Pac. 640 (1930); Atchison, *etc.*, Ry. Co. v. Pub. Serv. Comm. of Kan., 130 Kan. 777, 288 Pac. 755 (1930).

[72]Chicago, *etc.*, Ry. Co. v. State, 126 Okla. 48, 258 Pac. 874, 877 (1927).

convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity. . . . The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as it may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community."[73]

In passing upon an application for a certificate authorizing additional facilities, which had for some time already been in use without authority, the Ohio court sustained a denial of the certificate saying that the fact that the public had become accustomed to the unauthorized service does not show it to be a public convenience and necessity.[74] This is, of course, true. Nevertheless, if the unauthorized service has had a fair period of trial and has proved to be more of a convenience to users than a detriment to the nonusers in the sense of hurting other servants, the certificate should be granted. It is human to enjoy authority and resent the flouting of our authority by those under us, and commissions must be careful lest they deprive the public of a useful service in order to teach operators without a permit respect for the commission. That lesson should be taught in some way other than by depriving the public of a service it has come to rely upon, and which cannot be shown to be positively harmful.

The service must be a convenience and necessity to the public. That a considerable number of individuals will be convenienced by the proposed service is not enough, if they are not greatly inconvenienced by the lack of it, and if to grant the application would be detrimental to the community as a whole, as by jeopardizing another utility needed by it.[75] The number of people asking for the new service is not the test.[76] However, if it will be a real convenience to a substantial number the certificate ought to be granted unless it is shown that to grant it will result in positive harm to others of the public to an extent outweighing the good to those to be served. The general rule, however, seems to be that there must be a positive finding of an advantage to the general public.[77] Thus

[73]Wabash, *etc.*, Ry. v. Commerce Comm., 309 Ill. 412, 141 N. E. 212, 214 (1923).

[74]Stark Elec. R. R. Corp. v. Pub. Util. Comm., 121 Ohio St. 550, 170 N. E. 360 (1930).

[75]West Suburban Transp. Co. v. Chicago & West Towns R. R. Co., 309 Ill. 87, 140 N. E. 56 (1923).

[76]Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1027, 130 So. 587 (1930).

[77]West Suburban Transp. Co. v. Chicago & West Towns R. R. Co., 309 Ill. 87, 140 N. E. 56 (1923); Choate v. Ill. Commerce Comm., 309 Ill. 248, 141 N. E. 13 (1923); Red Star Transp. Co. v. Red Dot Coach Lines, 220 Ky. 424, 295 S. W. 419 (1927); Pub. Serv. Co. v. Rd. Comm., 104 W. Va. 183, 139 S. E. 744 (1927).

the commission for the District of Columbia went so far as to deny a bus certificate to serve a real estate development because operations could not be compensatory within a reasonable time, though no one protested the granting of the certificate, and the developing real estate company had contracted with the applicant to indemnify it against loss.[78] This seems utterly ridiculous. No one could possibly be hurt by the operation, and while the development of the land as city property might not be a public good, it would certainly be no detriment to the general public. As long as the public is not to be hurt or its interests placed in jeopardy, the fact that the proposed operation will not be profitable should not result in a denial of the right to offer the service. In the first place the commission should remember that it is not the repository of all wisdom, and its opinion as to the prospect of the future success of the line is not necessarily sound. Secondly, the commission is not the guardian of the applicant but rather a sort of public watchdog. When the watchdog strays off the premises he is supposed to guard, he becomes a nuisance if not an actual danger.

The California commission held that in time of depression existing utilities should not be required to face new competition unless the applicant could show conclusively that the existing service was inadequate.[79] The same commission denied the right of a water company to extend into an unserved area in absence of proof of public convenience and necessity.[80] Again, it required for a bus certificate more proof than that the additional service would be a convenience to summer vacationists and would develop tourist traffic, and that the applicant believed sufficient traffic could be developed.[81] The Colorado commission denied a bus certificate to a rural district though the railroad service was at an inconvenient hour and only one stop per day was offered, saying that the question of the adequacy of the rail service depends upon population, location, and demand.[82] This is quite correct if the proceeding is one to force the railroad to improve its service, but in passing upon the right of a bus operator to serve the territory, the rule is not necessarily the same. Unless the bus would cause discontinuance of a necessary train service, this decision seems too harsh. The people in a sparsely settled area are entitled to all the conveniences in transportation anyone is willing to give them so long as to allow such service will not materially interfere with the welfare of the

[78] *Re* Washington Ry. & Elec. Co., P. U. R. 1926D 653 (Pub. Util. Comm. of D. C.).

[79] *Re* Kagarise, P. U. R. 1933C 168 (Cal. R. R. Comm.).

[80] *Re* Robinson, P. U. R. 1927C 501 (Cal. R. R. Comm.).

[81] *Re* Pickwick Stages, P. U. R. 1926C 70 (Cal. R. R. Comm.); and see *Re* Lawrence Heat, *etc.*, Co., P. U. R. 1926B 125 (N. Y. Pub. Serv. Comm.).

[82] *Re* Motor Travel Bureau, Inc., P. U. R. 1926D 579 (Colo. Pub. Util. Comm.).

general public. Of course, under these statutes the mere desire of the applicant to engage in the business is not enough,[83] and the burden is upon him to prove his right to the certificate.[84] However, the Virginia commission, following the Virginia inclination to allow competition between utilities of different types, granted a bus certificate to compete with a railroad giving adequate railroad service, because it was not shown that the competition would be ruinous.[85] Similarly, other commissions have granted competing certificates where there was enough business for two operators,[86] or if it otherwise appeared that the competition would not be ruinous to the service generally so as to be actually harmful to the public.[87] These cases seem to adopt the better view of permitting one desiring to render service to do so unless his entering the field will be positively harmful to the general public as distinguished from the existing operator.

To say that one has no right to engage in a business when to do so will be detrimental to the public welfare is one thing. To say that he cannot engage in the business unless he can prove that his so doing will not only be beneficial to a substantial number of individuals but will also be an actual benefit to the general public in the affected area is another thing, and, it is submitted, that to so hold is unjustifiable unless the statute clearly requires such a holding. If the statute so requires, the statute is valid so far as businesses requiring the use of public property are concerned, but such a statute is unwise and should be changed to permit the maximum freedom of activity consistent with absence of injury to the public. While there is a current dread of the epithet "Conservative" and most of us now desire above all things to be regarded as "Liberals," we should remember that the true Liberal is one who dislikes to impose restrictions on others as much as to have restrictions imposed upon himself. On the bench the liberal mind gives the legislature the widest freedom consistent with the Constitution. In the legislature the true Liberal imposes as few restrictions upon the individual's freedom of action as is consistent with the public good. It is not liberal legislation which denies to a man the right to serve those who want his service. Unless his serving such people will injure the community as a whole, he should be allowed to serve.

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[83]Railway Express Agency, Inc. v. Consol. Package Service, P. U. R. 1933C 104 (Cal. R. R. Comm.).

[84]*Re* Lawrence Heat, *etc.*, Co., P. U. R. 1926B 125 (N. Y. Pub. Serv. Comm.).

[85]*Re* Wright, P. U. R. 1925B 141 (Va. Corp. Comm.).

[86]*Re* Harrison's Freight Service, P. U. R. 1931D 24 (Ariz. Corp. Comm.).

[87]*In re* Weaver, P. U. R. 1931A 365 (Ala. Pub. Serv. Comm.); *Re* Paradox Land & Transp. Co., P. U. R. 1926B 824 (Colo. Pub. Util. Comm.).

Adequacy of the Existing Service

It is generally said that there is no public convenience and necessity for a new service of the same kind if the public is already adequately served by existing utilities.[88] " 'Reasonably adequate' does not contemplate the highest character of service either as to frequency or directness, but only contemplates a service which, when measured by the expense of the service, the volume of traffic, and the needs of the public, is practicable."[89]

If a gas company has not a supply adequate to serve all those in the territory wishing gas, its service is not adequate even though it renders satisfactory service to those now connected.[90] In the transportation field "ability to carry in some manner all who apply for passage is not necessarily the touchstone," and where large numbers wish to travel on busses they should be given an opportunity to do so though existing railroads can carry all who wish to travel.[91] Where the rail service from cities of distribution is so slow that merchants in a community in the same state are unable to compete with those across the border in another state, who are served by trucks from the said cities of distribution, it is held that the rail service is inadequate and a truck certificate should be granted.[92] Again, suburban motor service which does not carry residents of the suburbs into the city in the morning and to the suburb at night is inadequate though every family in the suburb owns an automobile.[93] An objectionable transfer on the railroad has been held to show such service inadequate on an application for a bus certificate.[94] Local service with no through service may be inadequate[95] though this is not necessarily true. The supplying of water objectionable in taste is inadequate service by a water com-

[88]West Suburban Transp. Co. v. Chicago, *etc.*, Rys., 309 Ill. 87, 140 N. E. 56 (1923); Egyptian Transp. System v. L. & N. R. R. Co., 321 Ill. 580, 152 N. E. 510 (1926); Red Star Transp. Co. v. Red Dot Coach Lines, 220 Ky. 424, 295 S. W. 419 (1927); State v. Pub. Serv. Comm., 327 Mo. 249, 37 S. W. (2d) 576 (1931); Coney Island Bus Corp. v. Pub. Util. Comm., 115 Ohio St. 47, 152 N. E. 25 (1926); Freight Forwarding Co. v. Pub. Util. Comm., 126 Ohio St. 16, 183 N. E. 790 (1932); Pub. Serv. Co. v. Rd. Comm., 104 W. Va. 183, 139 S. E. 744 (1927).

[89]Coach Co. v. Pub. Util. Comm., 123 Ohio St. 127, 174 N. E. 244 (1930); A. & T. Motor Freight, Inc. v. Pub. Util. Comm., 125 Ohio St. 617, 184 N. E. 11 (1932); Fulmer v. Northern Pac. Transp. Co., P. U. R. 1932A 509 (Mont. Bd. R. R. Com'rs).

[90]Wichita Gas Co. v. Pub. Serv. Comm., 132 Kan. 459, 295 Pac. 668 (1931).

[91]Petersburg, *etc.*, Ry. Co. v. Commonwealth, 152 Va. 193, 146 S. E. 292 (1929); Okla. Union Ry. Co. v. State, 146 Okla. 92, 293 Pac. 537 (1930); A. T. & S. F. Ry. Co. v. Pub. Serv. Comm. of Kan., 130 Kan. 777, 288 Pac. 755 (1930). *Contra*: Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1631, 131 So. 777 (1926).

[92]*Re* Middaugh, P. U. R. 1927E 207 (Wash. Dept. of Pub. Wks.).

[93]*Re* Pierce, P. U. R. 1926E 811 (Wash. Dept. of Pub. Wks.).

[94]*Re* Ward, P. U. R. 1925E 574 (Ariz. Corp. Comm.).

[95]*Re* Reeder Trucking Co., P. U. R. 1926D 55 (Ind. Pub. Serv. Comm.).

pany, better water being obtainable.[96] Dissatisfaction with telephone service so great as to cause a large number of former subscribers to disconnect shows inadequacy.[97] Excessive rates have been considered to show inadequacy of existing service,[98] but it is usually held that since the commission can regulate and lower the rates, this is not evidence of inadequacy of service.[99] Thus, what is adequate service must depend upon all the circumstances and each case is to be decided on the local needs at the particular time.[100]

A strong demand for the new service has been held to be impelling evidence of the public need for it.[101] That customers of the existing company have complained to the commission of its service was held sufficient evidence to show inadequacy of service.[102] While this, of itself, seems little evidence of inadequacy, as the complaints may be unwarranted, the Colorado commission seems clearly in error in saying that lack of complaints shows the existing service to be adequate,[103] for the consuming public is usually quite patient and slow to go to the commission with annoying defects in the service, which are relatively trivial, particularly when these consumers have not the advantage of comparing their service with that enjoyed by patrons of other companies. The Vermont commission held that inadequacy of street railway service was admitted by the street railroad's filing an application for a bus certificate, following a similar application by another person.[104] This seems error, as the railway was simply seeking the right to install busses if the commission found, over its protest, that its existing service was inadequate.

Several commissions have held that before the new certificate will be granted there must be conclusive proof of inadequacy of the existing service.[105] This is going entirely too far. The most the applicant should be required to show is that if he enters the field the public will not be hurt. If the existing utilities are fur-

[96]City of Vincennes v. Vincennes Water Supply Co., P. U. R. 1931A 347 (Ind. Pub. Serv. Comm.).

[97]*Re* Garden Valley Tel. Co., P. U. R. 1928D 754 (Minn. R. R. & Wh. Comm.).

[98]*Re* Municipal Gas Co., P. U. R. 1928D 418 (Okla. Corp. Comm.).

[99]*Re* Waverly Water Co., P. U. R. 1929C 436 (Pa. Pub. Serv. Comm.).

[100]*Re* Western Slope Motor Way, Inc., P. U. R. 1928A 32 (Colo. Pub. Util. Comm.).

[101]*Re* New Castle Transit Co., P. U. R. 1926B 185 (Ind. Pub. Serv. Comm.); *Re* Eckroth, P. U. R. 1926A 357 (Pa. Pub. Serv. Comm.).

[102]*Re* C. and J. Call, P. U. R. 1932D 387 (Wyo. Pub. Serv. Comm.).

[103]*Re* Giacomelli Bros., P. U. R. 1928A 425 (Colo. Pub. Util. Comm.).

[104]*Re* Jewett, P. U. R. 1928B 225 (Vt. Pub. Serv. Comm.).

[105]*Re* International Auto Stages Line, P. U. R. 1925A 428 (Ariz. Corp. Comm.); *Re* Townsend, P. U. R. 1928A 175 (Colo. Pub. Util. Comm.); *Re* Pless and Davis, P. U. R. 1928B 783 (Colo. Pub. Util. Comm.).

nishing adequate service they should be able to show it. Since it is difficult for the commission to ascertain whether the service is adequate, and there is no existing competition to induce efficiency and courtesy, it would seem not unreasonable to require the operator, who asserts a right to keep others out of his field, to prove to the satisfaction of the commission, not only that he is serving efficiently and courteously, but that the proposed competition will in addition to depleting his gross revenue, result in an actual decrease in the service now available to the public.

What is the Same Territory?

The purpose of requiring a certificate of convenience and necessity being to prevent a duplication of service and competition detrimental to the public, it follows that the existing utility is not entitled to protection from competition in a different territory. In the field of transportation it is not always easy to determine what is the territory served by the existing carrier. It has been held that a new highway connecting the same terminal cities as the old road over which a carrier is operating is in the same territory as the old road, though there is some local traffic peculiar to each highway, the majority of passengers or freight going, however, from terminal to terminal.[106] However, if there are intermediate communities on the new road not adequately reached by the service on the old route, so that the local business which will be served is substantial, and particularly where the roads are a considerable distance apart or are separated by natural barriers such as a mountain chain or a river, the tendency has been to regard the two roads as lying in different territories even though they serve the same termini.[107] This is particularly true where the new route is longer so that additional service will not compete for through passengers.[108] On the other hand, where the new route is shorter so that the existing company will lose most of the through traffic, the new route is apt to be regarded as in the same territory, and the shortening of the through trip as a convenience merely and not enough to justify a competing certificate.[109] The existing carrier's certifi-

[106]Sohngen v. Pub. Util. Comm., 115 Ohio St. 449, 154 N. E. 734 (1926); Freight Forwarding Co. v. Pub. Util. Comm., 126 Ohio St. 16, 183 N. E. 790 (1932); Texas Motor Coaches, Inc. v. R. R. Comm., 41 S. W. (2d) 1074 (Tex. Civ. App. 1931); Pacific, *etc.*, Traction Co. v. Dept. of Pub. Wks., 151 Wash. 659, 276 Pac. 566 (1929); *Re* Overall and Askin, P. U. R. 1927C 385 (Cal. R. R. Comm.).

[107]Texas Motor Coaches, Inc. v. R. R. Comm., 123 Tex. 517, 73 S. W. (2d) 511 (1934); Texas Motor Coaches, Inc. v. R. R. Comm., 59 S. W. (2d) 923 (Tex. Civ. App. 1933); Spokane-North West Auto Freight v. Dept. of Pub. Wks., 148 Wash. 61, 268 Pac. 138 (1928); *Re* Audette, P. U. R. 1931A 219 (Wash. Dept. of Pub. Wks.).

[108]*Re* Rochester, *etc.*, Coach Lines, Inc., P. U. R. 1931A 289 (N. Y. Pub. Serv. Comm.).

[109]Railroad Comm. v. Shupee, 57 S. W. (2d) 295 (Tex. Civ. App. 1933).

cate does not entitle it to use the new road, as the certificate is not for the service between the terminal cities, but for service between such cities over the prescribed route, and, before such carrier can run over a new and distinct highway between the termini, it must obtain a certificate of public convenience and necessity for that route.[110] Thus, the question of the limits to the territory served is one of fact and usually in the discretion of the commission. It cannot be separated entirely from the question of adequacy of the existing service.[111] If the outlying portions of the area whose inhabitants patronize the existing carrier can be reached more conveniently by another road, and if such additional service will not cause a crippling loss to the existing carrier, the application is likely to be granted. Sometimes it is granted on the ground that it is for a new territory and sometimes on the ground that the existing service is not adequate. Since the sole justification for denying the right to serve is that the service would injure the public, where there is reasonable doubt as to whether the proposed service will encroach upon an occupied territory, the commission should exercise its discretion in favor of the new service.[112] It is important to distinguish between adequacy of existing service and the territorial limits of that service for in most states if it is a matter of inadequacy, the existing carrier must be given a reasonable opportunity to improve before a new certificate is granted, whereas the existing carrier has no such preference as to a separate territory.

The territory served by an interurban bus extends much further on each side of the highway used than does the territory served by an intraurban bus or street railway. In the latter case a distance of one thousand feet has been held enough to justify a rival line.[113] In the case of power companies or telephone companies the tendency is to give wide limits to occupied territories so as to give the existing company the sole right to serve inhabitants living in the particular block of territory surrounding its exchange or high-voltage lines, and a rival finding a hole in the outer boundary of the block cannot run a line through it to serve isolated individuals unserved by the existing company.[114]

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[110]Northern Pac. R. R. v. Yakima, *etc.*, Stages, 135 Wash. 595, 238 Pac. 905 (1925).

[111]Pugent Sound Nav. Co. v. Dept. of Pub. Wks., 152 Wash. 417, 278 Pac. 189 (1929).

[112]See Southside Transp. Co. v. Commonwealth, 157 Va. 699, 161 S. E. 895 (1932).

[113]*Re* Appleyard, P. U. R. 1926D 201 (Vt. Pub. Serv. Comm.).

[114]Pub. Serv. Co. of Colo. v. City of Loveland, P. U. R. 1928C 35 (Colo. Pub. Util. Comm.).

Service of a Different Kind

The applicant is usually denied the right to compete where an existing utility is giving adequate service of the same kind.[115] It is not the purpose of the statutes to deny the public the advantages of new and better service. As the Virginia court has said: "Convenience and necessity, as those words are used in the statute carry with them a certain elasticity of meaning, which, in other circumstances, does not always attach. Silk is a necessary article of wearing apparel, although with cotton, linen, and wool we can be tastefully and comfortably clothed. We have to concede that, in industrial development, the law of the survival of the fittest is not to be gainsaid. Stage coaches and canals were in many instances a total loss, made so by railroads, which in their turn clashed with interurban electric lines, and now both are facing the automobile in its varied forms. Should the time come when airplanes are preferred by a substantial part of the public, this preference, in its turn, will have to be heeded. They, too, will have then become a necessary public convenience not to be put aside because busses can carry all who wish to go."[116]

On the other hand, at the present time railroads are essential. Busses and trucks cannot now completely replace them. The time may come when they or some now-undiscovered mode of transportation will be able to do so. When that time comes the railroads must share the fate of the stage coach, but until then it is suicidal for the state to strangle them with motor carriers, however convenient the latter may be. As the Nevada commission has said, the question here is not whether the proposed motor service will hurt the railroads but whether through hurting the railroads it will hurt the state.[117] The demands of modern civilization must be heeded, and it must be constantly borne in mind that we have not reached perfection in the transportation field but the future will bring, as the past has brought, a constant stream of inventions making life more comfortable. To block this stream by denying to the inventor a market for his new service is not in the public interest. We must move, but in moving must preserve the existing services as far as is consistent with progress. What seems today to be a wonderful convenience in transportation will tomorrow be antiquated. As fast as we can substitute the better for the good we should do so, but the substitution should be gradual, and

[115]Corp. Comm. of Ariz. v. People's Freight Line, 41 Ariz. 158, 16 P. (2d) 420 (1932); Pub. Serv. Interstate Transp. Co. v. Pub. Serv. Comm., 233 App. Div. 162, 251 N. Y. Supp. 350 (3d Dept. 1931); Clifton Forge, *etc.*, Tel. Co. v. Commonwealth, 165 Va. 38, 181 S. E. 439 (1935).

[116]Petersburg, *etc.*, Ry. Co. v. Commonwealth, 152 Va. 193, 146 S. E. 292, 295 (1929).

[117]*Re* Pickwick Stages, Inc., P. U. R. 1930A 404 (Nev. Pub. Serv. Comm.).

no faster than the new service develops the capacity to replace the old. Yet to deny the right to use the new at all until it grows to full stature is absurd, for it cannot grow except as put to use.

Electricity is not to be held back from a normal development simply because it reduces the market for coal.[118] Natural gas is not to be kept in the ground or allowed to waste simply because a manufactured gas plant gives what now appears to be adequate service.[119] Nor, should natural gas, which will some day be exhausted, be protected to the extent of discouraging by exclusion from the market, the development of electricity or a substitute manufactured gas. The latter may not now be so convenient. If not, the competition should not be severe. However, substitutes should be developed constantly, and encouraged to improve by giving to the substitute as wide a market as is consistent, not with maintaining the present prosperity of the existing company, but with maintaining the service at a reasonable degree of efficiency until the substitute is ready to take over the field. If the substitute proves to be no better than the existing service, it is not likely to run the existing service out of the field entirely, but it should be given every chance to do so consistent with maintaining a combination of services at least as good as the old service alone would have been.

An electric railway and a steam railway have been held to be dissimilar services.[120] Again, furnishing natural gas in adequate volume to industrial users only was held not to be similar to the service rendered by a company compelled to give domestic consumers a preference in case of shortage,[121] and express service being faster and more expensive a certificate for motor freight service was granted on the ground that the latter was a dissimilar service.[122] Certificates have been granted for the transportation of a certain type of freight requiring unusual equipment though an existing carrier could carry such goods in a less satisfactory way;[123] and for a one way delivery service for merchants;[124] and for a motor tour service though a regular bus service existed.[125]

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[118]*Re* West Virginia Power & Transmission Co., P. U. R. 1930D 225 (W. Va. Pub. Serv. Comm.).

[119]McFayden v. Pub. Util. Comm., 50 Idaho 651, 299 Pac. 671 (1931). But see *Re* Western Gas Co., P. U. R. 1930A 307 (Cal. R. R. Comm.).

[120]Sou. Pac. Co. v. San Francisco, *etc.*, R. R. Co., P. U. R. 1929A 116 (Cal. R. R. Comm.).

[121]*Re* Industrial Gas Co., P. U. R. 1929A 516 (Mo. Pub. Serv. Comm.).

[122]*Re* Cook, P. U. R. 1926D 64 (Mont. Bd. of R. R. Com'rs).

[123]*Re* Pless, 12 P. U. R. (N.S.) 111 (Colo. Pub. Util. Comm. 1935); *Re* Kidd, P. U. R. 1925C 414 (Colo. Pub. Util. Comm.).

[124]*Re* United Parcel Service, *etc.*, Inc., P. U. R. 1926E 321 (Cal. R. R. Comm.).

[125]*Re* Boyd, P. U. R. 1925A 715 (Cal. R. R. Comm.).

It is generally held that a motor carrier picking up or delivering anywhere on the route and at the door of the customer renders a different service from that of the railroad serving from station to station alone,[126] but the contrary has been held where it was thought that the railroad would be seriously hurt.[127] It would seem clear that this is a different service and the great convenience of it should not be withheld from the public except where clearly necessary in order to retain another service which is not now replacable. Motor carriers to compete with carriers by water present the same problem and while they clearly give a different and speedier service, with the pick-up and delivery feature added,[128] the motor certificate may be denied if the danger of loss of the water carrier outweighs the added convenience of the motor service.[129]

As has been said, the railroads still, and for a long time at least, will continue to supply a public need. As yet no adequate substitute for them has been found. Therefore, most states require by statute or by court decision or commission policy that the commission consider the effect of the proposed motor service upon the railroads before granting the certificate. This is as it should be, for a convenience to a few communities should not be purchased at the cost of a necessity of economic life to the state as a whole.[130] Many cases hold that if railroad service is adequate though less

[126]Yazoo, *etc.*, R. R. Co. v. La. Pub. Serv. Comm., 170 La. 441, 128 So. 39 (1930); *Re* Lewis, P. U. R. 1926D 576 (Colo. Pub. Util. Comm.); *Re* Wirtz Bros. Motor Exp. Co., P. U. R. 1926D 690 (Ind. Pub. Serv. Comm.); *Re* Bee Line, Inc., P. U. R. 1926D 67 (N. Y. Pub. Serv. Comm.); *Re* Way, P. U. R. 1927D 305 (N. Y. Pub. Serv. Comm.); *Re* Tri-City Motor Transp. Co., P. U. R. 1930B 417 (N. D. Bd. of R. R. Com'rs); *Re* Transp. Co., P. U. R. 1927A 856 (S. D. Bd. of R. R. Com'rs); *Re* Streeper, P. U. R. 1925A 284 (Utah Pub. Util. Comm.).

[127]McClure v. Pub. Util. Comm., 121 Ohio St. 485, 169 N. E. 560 (1929); *Re* Dinsmore, P. U. R. 1927B 114 (Colo. Pub. Util. Comm.); *Re* Miller, P. U. R. 1925A 390 (Wash. Dept. of Pub. Wks.).

[128]*Re* Carlsen, P. U. R. 1927E 428 (Wash. Dept. of Pub. Wks.).

[129]State v. Dept. of Pub. Wks., 124 Wash. 234, 214 Pac. 164 (1923); *Re* Olympia, *etc.*, Auto Freight Co., P. U. R. 1928C 113 (Wash. Dept. of Pub. Wks.).

[130]Choate v. Ill. Commerce Comm., 309 Ill. 248, 141 N. E. 13 (1923); Cincinnati Traction Co. v. Pub. Util. Comm., 112 Ohio St. 699, 148 N. E. 921 (1925); East End Traction Co. v. Pub. Util. Comm., 115 Ohio St. 119, 152 N. E. 20 (1926); Stark Elec. R. R. Co. v. Pub. Util. Comm., 118 Ohio St. 405, 161 N. E. 208 (1928); Vander Werf v. Bd. of R. R. Com'rs, 58 S. D. 586, 237 N. W. 909 (1931); Pub. Serv. Co. v. Rd. Comm., 104 W. Va. 183, 139 S. E. 744 (1927); *Re* Rudy, P. U. R. 1925D 743 (Iowa Bd. R. R. Com'rs); *Re* Weiner, P. U. R. 1925B 357 (Me. Pub. Util. Comm.); *Re* Murphey Transfer & Storage Co., P. U. R. 1927C 806 (Minn. R. R. & Wh. Comm.); *Re* Simms, *etc.*, Freight Service, P. U. R. 1926C 818 (Mont. Bd. R. R. Com'rs); Pub. Serv. Ry. Co. v. Mayr, P. U. R. 1926E 352 (N. J. Bd. Pub. Util. Com'rs); *Re* Tri-City Motor Transp. Co., 14 P. U. R. (N.S.) 55 (D. C. N. D. 1936); *Re* New Prot. Elec. Corp., P. U. R. 1925E 309 (R. I. Pub. Util. Comm.); *Re* Wyoming Transp. Co., P. U. R. 1925E 861 (Wyo. Pub. Serv. Comm.).

convenient, the motor carrier should be denied the right to serve, and place upon the motor carrier the burden of showing clearly the inadequacy of the railroad service to meet the transportation needs of the public.[131] This goes too far. Adequate service can be improved upon, and a wholly new type of transportation offering greater convenience should not be withheld from the public merely because the railroads want all the business and can handle it after a fashion.[132] A finding that the particular railroad renders a service necessary to the community as a whole, plus a finding that the proposed competition will actually endanger its ability to continue this service and that the applicant could not provide a complete substitute justifies the denial of the motor carrier's application.[133] Nothing short of this should be regarded as a basis for refusal.

Of course, the railroad should not be placed in danger for the sake of a motor service which is not dependable or otherwise not a substantial convenience.[134] But, where the railroad service is indirect[135] with poor connections,[136] or so infrequent as to handicap merchants competing with those of a neighboring city for the trade of the intervening rural area,[137] or at hours inconvenient to travelers and requiring two days for a short round trip to the county seat,[138] or the passenger station is remote from the business section,[139] motor certificates have been granted, there being no showing of serious injury to the railroad. Other commissions have held that the growth of bus and truck service shows a public demand which in turn shows a public convenience and necessity for the admission of motor carriers wherever their operation will not be positively harmful to the transportation service as a whole.[140]

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[131]Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1631, 131 So. 777 (1931); C. B. & Q. R. R. Co. v. Commerce Comm., 345 Ill. 576, 178 N. E. 157 (1931); Pub. Serv. Interstate Transp. Co. v. Pub. Serv. Comm., 233 App. Div. 162, 251 N. Y. Supp. 350 (3d Dept. 1931).

[132]Petersburg, *etc.*, Ry. Co. v. Corp. Comm., 152 Va. 193, 146 S. E. 292 (1929); *Re* Lee, P. U. R. 1927A 150 (S. D. Bd. R. R. Com'rs).

[133]*Re* Virginia & Truckee Ry. Co., P. U. R. 1928C 203 (Nev. Pub. Serv. Comm.); *Re* Hamilton, P. U. R. 1927B 207 (Ariz. Corp. Comm.); *Re* King, P. U. R. 1927C 463 (Utah Pub. Util. Comm.); *Re* Andrews, P. U R. 1925D 819 (Wash. Dept. of Pub. Wks.).

[134]Williams, Receiver v. Pub. Serv. Comm. of Md., 6 P. U. R. (N.S.) 213 (C. C. Md. 1934); *Re* Burnett, P. U. R. 1931C 490 (Mont. Bd. R. R. Com'rs).

[135]*Re* Crabb, P. U. R. 1927B 222 (S. D. Bd. R. R. Com'rs).

[136]*Re* Sioux Falls Traction Co., P. U. R. 1926D 194 (S. D. Bd. R. R. Com'rs).

[137]*Re* Billings-Sheridan Motor Freight Line, P. U. R. 1931A 46 (Mont. R. R. Comm.).

[138]*Re* Nokomis Bus Line, Inc., P. U. R. 1927A 828 (Ill. Commerce Comm.).

[139]*Re* Tri-County Transit Co., P. U. R. 1927A 823 (Ill. Commerce Comm.).

[140]*Re* Purple Swan, *etc.*, Coach Lines, P. U. R. 1928A 193 (Mo. Pub. Serv. Comm.); *Re* International Bus Corp., P. U. R. 1927A 346 (N. Y. Pub. Serv. Comm.).

Where the motor carrier would draw patrons chiefly from those now driving their own vehicles and only to a slight degree from the railroad, the certificate should be granted as it will not substantially increase the competition now existing between the railroad and private vehicles.[141] That the motor carrier will reduce the railroad's revenues is not a sound reason for denying the certificate.[142] The question is, Will the granting of the certificate finally result in a better or a poorer total of transportation service for the community as a whole?

Railroads have no inherent right of protection against the competition of motor vehicle carriers.[143] In one case[144] the state had been giving the railroad an annual subsidy, and the court said that it would be inconsistent to allow a competing bus which would further deplete the earnings of the road. What the court overlooked is that the subsidy to the railroad was not limited to the money paid. In denying the bus certificate, the court was forcing the public to ride on its trains when a bus service would have been cheaper and more convenient, and to this extent was further subsidizing the railroad. If the railroad is still an essential to the economic life of the state, and in most cases it certainly is, and if those people and those businesses to whom and to which it is an essential cannot afford to pay the higher rates necessary to preserve it, is not a subsidy in cash preferable to the indirect subsidy afforded by a denial to other people of the opportunity to ride on and ship by a motor carrier whose services they find cheaper or more convenient? The cash subsidy has, at least, the advantage of certainty of amount, and it will not be kept up longer than necessary. In the meantime, inventions and discoveries are encouraged. The really essential service of the railroads is in the fields of heavy freight transportation and long hauls of freight or passengers. The local service and the light freight service of the railroads is fast becoming non-essential except to the extent that it maintains the railroads for the other and essential uses. Would it not be better to recognize these facts, and the fact that the motor vehicle is not only here to stay, but here to grow and improve? If the railroad can make money from its non-essential services let it continue to give them, but also let it have no protection from a better and more convenient and cheaper competing service in these fields. If the railroad has to withdraw from these fields, its gross revenues will be cut but so will its gross expense. The net loss to

[141] *Re* Egyptian Transp. Co., P. U. R. 1929E 199 (Ill. Commerce Comm.); *Re* Yelloway, Inc., P. U. R. 1928A 217 (Mo. Pub. Serv. Comm.).

[142] *Re* Arnett, P. U. R. 1925A 832 (Colo. Pub. Util. Comm.).

[143] West v. Williams, 167 Md. 316, 173 Atl. 259 (1934).

[144] Williams, Receiver v. Pub. Serv. Comm., 6 P. U. R. (N.S.) 213 (C. C. Md. 1934).

the railroads should be made up by higher rates for the essential services where higher rates are practicable. Where they are not, to the extent that preservation of the railroad requires that it be made up, it should be made up by a direct subsidy from the public treasury.

Restricted Certificates

A frequently used method of protecting the existing carrier, whether a railroad or not, is to grant what is known as a restricted certificate. For example, when the commission finds that an existing carrier gives adequate service between towns *A* and *B*, but public convenience and necessity requires a bus line running from *C* through *B* to *A*, the commission may grant a certificate for such service but so restrict it as to prohibit the applicant from carrying passengers whose entire trip lies between *A* and *B*.[145] Thus a certificate for through service without a right to do local service where the local service is adequately handled at present may be granted, and, conversely, a certificate to do a local business with no right to do a through business where the terminal to terminal traffic is adequately served may be granted.[146] Again, the new applicant's certificate may be restricted to the carrying of a certain type of freight, or the serving of a special class of patrons.[147] Of course, restrictions as to the size of packages which may be carried on busses are proper as these relate to the comfort and safety of passengers thereon as well as to competition with existing freight lines.[148] Other common types of restrictions are those relating to a minimum rate to be charged by the new operator.[149]

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[145]Union Bus. Co. v. Douglass, 123 Fla. 292, 166 So. 582 (1936); C. B. & Q. R. R. Co. v. Commerce Comm., 345 Ill. 576, 178 N. E. 157 (1931); Red Diamond Bus Line v. Cannonball Transp. Co., 233 Ky. 482, 26 S. W. (2d) 28 (1930); Ohio Valley Transit Co. v. Pub. Util. Comm., 117 Ohio St. 95, 158 N. E. 182 (1927); North Bend Stage Line, Inc. v. Dept. of Pub. Wks., 162 Wash. 46, 297 Pac. 780 (1931); State v. Dept. of Pub. Wks., 165 Wash. 556, 6 P. (2d) 64 (1931); *Re* Valley Pub. Serv. Co., P. U. R. 1929E 218 (Ohio Pub. Util. Comm.); *In re* N. Y. Cent. R. R. Co., P. U. R. 1931B 510 (Ohio Pub. Util. Comm.); *Re* Linden, P. U. R. 1926D 782 (S. D. Bd. R. R. Com'rs).

[146]*Re* Black Canyon Stage, P. U. R. 1927A 816 (Ariz. Corp. Comm.); Bartonville Bus Line v. Eagle Motor Coach Line, 326 Ill. 200, 157 N. E. 175 (1927); Marion, *etc.*, Transit Co. v. Pub. Util. Comm., 125 Ohio St. 216, 180 N. E. 902 (1932).

[147]Arrow Carrier Corp. v. Pub. Serv. Comm., 120 Pa. Super. Ct. 570, 182 Atl. 711 (1936); *Re* Border Transp. Co., 10 P. U. R. (N.S.) 492 (Me. Pub. Util. Comm. 1935); *Re* St. Joseph Ry., *etc.*, Co., P. U. R. 1933A 405 (Mo. Pub. Serv. Comm.); *Re* Guerin, P. U. R. 1928A 709 (Pa. Pub. Serv. Comm.); *Re* Philadelphia, *etc.*, Co., P. U. R. 1927B 604 (Pa. Pub. Serv. Comm.); *Re* Calvert, P. U. R. 1927C 621 (S. D. Bd. R. R. Com'rs); *Re* Cambridge Tel. Co., P. U. R. 1926C 431 (Wis. Comm.).

[148]*Re* Wolting, 14 P. U. R. (N.S.) 467 (S. D. Bd. R. R. Com'rs 1936).

[149]*Re* Levy's Transfer, *etc.*, Co., P. U. R. 1932A 69 (Colo. Pub. Util. Comm.); *Re* Molloy, 4 P. U. R. (N.S.) 171 (Colo. Pub. Util. Comm. 1934); *Re* Peterson, 8 P. U. R. (N.S.) 825 (Colo. Pub. Util. Comm. 1934).

It may be objected that a certificate in the transportation field restricted as to certain parts of the route will lead to misunderstandings on the part of the travelers as to which bus is supposed to stop and pick them up, and that such restrictions may be violated as where the bus leaving from *A* to go to *C* accepts at the start a passenger going to *B*, a restricted point. However, these objections seem rather trivial as violations will be rare since the other company will be on the watch for them, and the public will soon learn which busses stop at the respective places. The use of the restricted certificate seems to be an excellent way in which to protect the existing carrier and at the same time give the public the advantage of new methods and servants. If a motor carrier is restricted as to business now adequately handled by the railroad, but is left free to render service to those not so served, the railroad will be protected to a great extent and at the same time the motor company is given a chance to win the public favor and grow in the ability to serve. When the motor company becomes capable of replacing the railroad service entirely without loss to the public of any convenience in transportation, the restriction should be thrown off. Where the public interest no longer requires the protection of the existing carrier, it should be given none, but should stand or fall according to its own inherent worth.

Companies Rendering the Same Service

Where there is already in the field a utility rendering adequate service and there is not enough business to be developed in the territory to support another company giving similar service, the probability is that if the second company is allowed to enter and compete the first company will not make a fair return and it may be forced to quit. Because of this, the prevalent view is that the second utility should not be allowed to enter the territory under such circumstances.[150] It is submitted that such a showing is not enough to warrant a denial of the competing certificate. The only justification for a denial is that such competition will injure the public, and if the applicant is now able to take over the field completely should he be successful in forcing the existing carrier out, or if it cannot be shown with reasonable certainty that the competition will cause the existing carrier to quit or its services to decline or its rates to rise, then the competitor should be allowed to enter. Certainly, where the two have been competing in other areas with no injurious effects there, they should both be permitted

[150] *Re* Wade, P. U. R. 1926E 312 (Cal. R. R. Comm.); *Re* Portland Bus Co., 1 P. U. R. (N.S.) 278 (Me. Pub. Util. Comm. 1933); Williams, Receiver v. Pub. Serv. Comm., 6 P. U. R. (N.S.) 213 (C. C. Md. 1934).

to enter the area in question unless there are peculiar local conditions.[151]

Where enough business can be developed in the territory to enable both companies to live in health, though the presence of the second makes life harder for the first, the second applicant should be admitted, unless other reasons for exclusion appear. The theory of exclusion though there is enough business for both is that as the volume of business declines the cost per unit of service rises and so the rates must rise. While this is true, if we assume that the existing rates are now at the absolute minimum, and that the existing company is now getting all the business that the two together would get, neither of these things is necessarily true. It is entirely possible that competition will result in still lower rates, more alert and accommodating service, and an increase in the total volume of business, resulting in higher returns to the shareholders. In any event, the commission should have the power to permit a competitor in a field now "adequately served."[152] "Even though two power companies may operate on the same schedule of rates, they may compete with each other in such matters as the character of the service they render, the courtesy and efficiency of their employees in doing it, the modernization of their equipment and the economy of their operation, all of which are matters of importance to the consumers. We have not reached the place where such improvements in equipment and methods of operation and service cannot be further perfected. Self interest in obtaining business and making profits is still and apparently will continue to be, the greatest incentive in bringing about such advancements."[153] Of course, for unnecessary duplication the public ultimately pays,[154] but is there any sure test by which we may know what duplication is "unnecessary"? Also, is it not possible that the resulting courtesy and alertness will be worth the price?

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[151]*Re* Postal Tel. Co., P. U. R. 1925C 398 (Cal. R. R. Comm.); *Re* Highway Transp. Co., P. U. R. 1926D 594 (Ind. Pub. Serv. Comm.).

[152]San Diego, *etc.*, Ferry Co. v. R. R. Comm. of Cal., 210 Cal. 504, 292 Pac. 640 (1930); State v. Atkinson, 275 Mo. 325, 204 S. W. 897 (1918); State v. Pub. Serv. Comm., 336 Mo. 985, 82 S. W. (2d) 105 (1935); *In re* Rochester, *etc.*, Traction Co., 118 App. Div. 521, 102 N. Y. Supp. 1112 (4th Dept. 1907); York Motor Express Co. v. Pub. Serv. Comm., 110 Pa. Super. Ct. 197, 168 Atl. 327 (1933); Beaver Valley Serv. Co. v. Pub. Serv. Comm., 112 Pa. Super. Ct. 221, 186 Atl. 304 (1936); Union Co-op Tel. Co. v. Pub. Serv. Comm., 206 Wis. 160, 239 N. W. 409 (1931). But see Corp. Comm. of Ariz. v. People's Freight Line, 41 Ariz. 158, 16 P. (2d) 420 (1932); Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1631, 131 So. 777 (1926); N. Y. Cent. R. R. Co. v. Pub. Util. Comm., 123 Ohio St. 370, 175 N. E. 596 (1931); Publix Cars, Inc. v. Yellow Cab, *etc.*, Co., 130 Neb. 401, 265 N. W. 234 (1936).

[153]State v. Pub. Serv. Comm., 333 Mo. 426, 62 S. W. (2d) 742, 746 (1933).

[154]Southside Transp. Co. v. Commonwealth, 157 Va. 699, 161 S. E. 895 (1932).

Contract Motor Carriers

Essentially the same problem arises where the state has adopted the policy of limiting the number of private motor carriers. Unquestionably, the state has the right to deny to anyone the right to use its highways as a place of business and may grant the right to some and not to others. That the person in question seeks to operate as a private carrier is immaterial.[155] Many states have statutes making the obtaining of a permit from the commission a condition precedent to the doing of a private carrier business. Usually the commission is not to grant the permit if it finds that the proposed operation would impair the efficiency of any common carrier serving the affected area in an adequate manner.[156] Apart from such a statute the private carrier cannot be enjoined from competing with an established common carrier over the same route.[157] Where such statutes exist they should be interpreted in favor of the right of the applicant in case of reasonable doubt, and the permit should in no case be denied unless there is a strong probability that the private carrier will actually injure the public by making it impossible for the common carrier to serve efficiently. The Colorado commission denied the right of an employee of an establishment to haul for his employer under contract, the employee to furnish the truck.[158] This is difficult to justify. The employer could certainly use his own truck and this same employee as driver to make the deliveries to his customers. To extend the statute to one carrying for a single establishment of which he is an employee, however large that establishment is, and however much the common carrier needs its business, seems too great a restriction upon the individual shipper.

An argument frequently advanced as justifying the denial of private carrier permits, and sometimes advanced in the common carrier cases, is that it is against the public interest to permit the highways to become congested.[159] Traffic congestion has a direct relation to safety and to ease of communication along the public roads, both matters clearly within the scope of the state's police power. But, traffic congestion had little, if anything, to do with the enactment of these statutes. They were designed solely and simply to give the existing carriers protection against competition. The enthusiasm of the common carriers by motor for restrictions

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[155]Stephenson v. Binford, 287 U. S. 251 (1932).

[156]*Ibid.*; *Re* Lampreht, 15 P. U. R. (N.S.) 39 (Colo. Pub. Util. Comm. 1936).

[157]Hissem v. Guran, 112 Ohio St. 59, 146 N. E. 808 (1925); State v. Nelson, 65 Utah 457, 238 Pac. 237 (1925).

[158]*Re* Lamm, 14 P. U. R. (N.S.) 331 (Colo. Pub. Util. Comm. 1936).

[159]Seaboard, *etc.*, Ry. Co. v. Wells, 100 Fla. 1027, 131 So. 587 (1930); *Re* City Cab Service, Inc., P. U. R. 1930A 113 (Conn. Pub. Util. Comm.); *Re* Steward, 9 P. U. R. (N.S.) 221 (Ind. Pub. Serv. Comm. 1934).

upon private carriers was to be expected. Having overcome the railroads' resistance to the granting of their own applications for certificates, these common carriers now want to close the gates tight. It is always so. We want freedom to engage in business for ourselves but, once in, we want no such freedom for others. Just as the busses and common carriers by truck have made the railroads give better service, so the private carriers are a constant spur in the flanks of the common carriers by motor. Nobody enjoys being spurred on to better work, but the spur is a useful implement to one who would ride. There is such a thing as using the spur too much and injuring the horse. So, the competition of private carriers with common carriers may actually injure the common carriers and thus injure the public. That justifies restricting the rights of the private carrier. The talk about traffic congestion is so much smoke to hide the privileges given the common carrier. If the privileges are justifiable because in the public interest the smoke screen is not necessary. If they are not, it should not be used. The right of the state to exclude everyone from using its roads as places of business is enough to justify reasonable statutes when attacked as unconstitutional. Actually, what are the roads for? If a highway is congested does it show too much traffic or the need for another or wider road? If large trucks are dangerous to private drivers is the proper remedy to limit the number of truck owners who may use the highway, which obviously does not necessarily limit the number of trucks, or to limit the size, weight, and speed and regulate the equipment of trucks and let the number take care of itself? Does a vehicle operated for hire congest the roads more than one operated to carry the truck owner's own goods? Would barring from the roads the private carrier for hire reduce the traffic by putting all the goods in the truck of the common carrier, or would some of the private carrier's customers begin to use their own trucks? If two of them elect to use their own trucks rather than pay the now increased rate charged by the common carrier the traffic has been increased by the statute. Similarly, with the argument that the trucks of private carriers wear out the road. The road is worn out no faster than by shipper-owned trucks or an increased number of common carrier trucks hauling what the private carrier formerly hauled, but if it were, the remedy is to require the truck owner to pay license taxes which will compensate for the wear on the road, not to say that he cannot use the road.

Choice of Applicants Where Public Convenience and Necessity Exists

We will now assume that the commission has determined that the public convenience and necessity requires a service in addition

to the one now offered. The question remains, Which of several applicants shall be permitted to render this service? Obviously, if there is to be a choice, then the applicant who will probably serve the public best should be awarded the certificate. Usually all applicants are fairly competent and which is best qualified to serve is a matter of opinion. The determination of this question must be left largely in the discretion of the commission.[160]

Commissions have selected the carrier who holds an interstate certificate over the same route[161] (and presumably the federal commission would favor a carrier holding an intrastate certificate); the carrier who is prepared to handle the largest volume of business;[162] the carrier with better connections;[163] the carrier with greater financial resources;[164] though financial resources beyond what is necessary to assure reliable and proper service are usually not considered.[165] The New York commission denied a certificate because the applicant did not show a financial ability to render the service needed by the public.[166] The commission cited as authority a case in which the court sustained the denial of a certificate to a railroad on the ground that land should not be taken by eminent domain for a railroad not of sufficient importance to make it a paying business.[167] Denial of the right to condemn land for a right of way and denial of the right to use an established highway to serve people not now served at all are different. There was no opposition to the bus application. Assuming that the applicant's service would be poor, it would certainly be better than none, and the public would not be hurt. If later a more capable carrier wished to serve, the first certificate could be revoked, if necessary, on the ground of inadequacy of service. Priority of application is considered where the applicants are equal in other respects,[168] but the slightest advantage to the public in preferring the latter applicant will justify such preference.[169]

Where the needed additional service is of the kind furnished by a utility in the field but such utility refuses to render it, such

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[160]Denman v. Dept. of Pub. Wks., 157 Wash. 447, 289 Pac. 34 (1930).

[161]*Re* Burlington Transp. Co., P. U. R. 1930C 380 (Mo. Pub. Serv. Comm.).

[162]*Re* Ariz. Storage & Distributing Co., P. U. R. 1926D 566 (Cal. R. R. Comm.).

[163]Pike's Peak Air Commerce, Inc., P. U. R. 1930E 308 (Colo. Pub. Util. Comm.).

[164]Filliponi v. Tonini, P. U. R. 1927A 1 (Cal. R. R. Comm.).

[165]Yazoo, *etc.*, R. R. Co. v. La. Pub. Serv. Comm., 170 La. 441, 128 So. 39 (1930); Lewis v. McLaren, P. U. R. 1928A 246 (S. D. Bd. R. R. Com'rs).

[166]*Re* Tompkins Bus Corp., P. U. R. 1928C 371 (N. Y. Transp. Comm.).

[167]Potter v. R. R. Comm., 124 App. Div. 47, 108 N. Y. Supp. 288 (3d Dept. 1908).

[168]*Re* Gillis, P. U. R. 1926A 826 (Okla. Corp. Comm.).

[169]*Re* Bibson, P. U. R. 1926A 826 (Cal. R. R. Comm.); *Re* Montana-Dakota Power Co., P. U. R. 1929A 369 (N. D. Bd. of R. R. Com'rs).

company will not be allowed to play the dog in the manger and claim protection from invasion of its territory. The certificate holder must proceed with diligence to serve the territory or lose its right to such protection.[170] A difference in method though the type of service is broadly the same makes it still easier for the commission to grant the certificate.[171] Thus, busses may be authorized to parallel railroads where the latter have rendered inadequate local service and show no inclination to improve the railroad service or to operate busses of their own.[172]

The rule in most states is that if the existing utility is ready and willing to give the additional service the commission finds to be needed in its territory, it should be allowed to give it in preference to the new applicant.[173] In a large number of states the statutes expressly provide that before a new company can be granted a certificate for a territory already occupied by a company rendering the same service in an inadequate manner, the commission must order the existing company to furnish the additional service and must give such company a reasonable time, usually set by the statute, in which to make the necessary improvements in its service. Where the statute so provides, of course, the commission and the courts must proceed in accordance with it.[174] It is submitted

[170]Southland Greyhound Lines, Inc. v. R. R. Comm., 73 S. W. (2d) 604 (Tex. Civ. App. 1933); Texas Motor Coaches v. R. R. Comm., 59 S. W. (2d) 923 (Tex. Civ. App. 1933); *Re* Gas Fuel Supply Co., 3 P. U. R. (N.S.) 55 (Cal. R. R. Comm. 1933); *Re* Oliver Power Co., P. U. R. 1932C 203 (Colo. Pub. Util. Comm.); *Re* Darnielle, P. U. R. 1928E 211 (Idaho Pub. Util. Comm.); *Re* Central Maine Power Co., P. U. R. 1932C 157 (Me. Pub. Serv. Comm.); *Re* Joplin Water Co., 10 P. U. R. (N.S.) 276 (Mo. Pub. Serv. Comm. 1935); *Re* Mo. City Tel. Co., P. U. R. 1928B 810 (Mo. Pub. Serv. Comm.); Atlantic City Elec. Co. v. So. Jersey P. & L. Co., P. U. R. 1928D 407 (N. J. Bd. Util. Com'rs); *Re* Vollmer, P. U. R. 1931C 371 (N. Y. Pub. Serv. Comm.); *Re* Harmar Water Co., P. U. R. 1925D 862 (Pa. Pub. Serv. Comm.); Appleyard v. Burlington Traction Co., P. U. R. 1927D 692 (Vt. Pub. Serv. Comm.); *Re* Town of Matoaka, 4 P. U. R. (N.S.) 198 (W. Va. Pub. Serv. Comm. 1934); Town of Pinedale v. Best Flume & Power Co., P. U. R. 1932D 96 (Wyo. Pub. Serv. Comm.).

[171]*Re* Gas Fuel Supply Co., 3 P. U. R. (N.S.) 55 (Cal. R. R. Comm. 1933).

[172]*Re* Ariz. Motor Transp. Co., P. U. R. 1929C 341 (Ariz. Corp. Comm.); *Re* Cannonball Coach Line, P. U. R. 1927B 572 (Ill. Commerce Comm.).

[173]Chicago Rys. Co. v. Commerce Comm., 336 Ill. 51, 167 N. E. 840 (1929); N. Y. Cent. R. R. Co. v. Pub. Util. Comm., 123 Ohio St. 370, 175 N. E. 596 (1931); State v. Pub. Serv. Comm., 327 Mo. 249, 37 S. W. (2d) 576 (1931); Yelton v. Dept. of Pub. Wks., 136 Wash. 445, 240 Pac. 679 (1925); *Re* Springport Mut. Tel. Co., P. U. R. 1926E 773 (Mich. Pub. Util. Comm.); Aure, *etc.*, Tel. Ass'n v. Alaska, *etc.*, Tel. System, P. U. R. 1932A 58 (Minn. R. R. & Wh. Comm.); *Re* Northport Transp. Co., Inc., P. U. R. 1927C 605 (N. Y. Pub. Serv. Comm.); *Re* Clayton Farmers Tel. Co. of Bowbells, P. U. R. 1930A 139 (N. D. Bd. R. R. Com'rs); *Re* Powell, P. U. R. 1928A 475 (S. D. Bd. R. R. Com'rs).

[174]Florida Motor Lines v. Street R. R. Comm., 101 Fla. 1018, 132 So. 851 (1931); Red Diamond Bus Line v. Cannonball Transp. Co., 233 Ky. 482, 26 S. W. (2d) 28 (1930); West v. Williams, 166 Md. 277, 170 Atl. 517 (1934); Coney Island Bus Corp. v. Pub. Util. Comm., 115 Ohio St. 47, 152 N. E. 25 (1926); Stark Elec. R. R. Co. v. Pub. Util. Comm., 118 Ohio St. 405, 161 N. E.

that such statutes are unwise. Under them there is little incentive for the existing company to be alert to discover ways to improve its service. There is little incentive for anyone else to go to the trouble and expense of discovering ways in which better service can be given the people of the territory, since, when an outsider satisfies the commission that there is an opportunity and need for the service he proposes to render, the existing company gets the benefit of his suggestion. The existing company will not be likely to extend service into new areas where the initial operations will probably not be compensatory and there is a chance that sufficient business cannot be developed. An outsider will not be so likely to ask for a certificate to serve such area because if he can satisfy the commission of the need for the service in it, he will not get the certificate if the existing utility wants it, which it probably will as soon as a competitor asks for it. Thus, the existing company develops a feeling of security in its territory and need not worry so much about giving the best possible service. If the commission finally discovers that its service is inadequate, which the commission is not likely to do until some other company files an application, the existing company simply promises to be good in the future and makes a present show of ability and willingness to improve, and gets the certificate for the needed additional service.

It is much better to leave the choice of applicants in the sound discretion of the commission. Under such a plan, the existing company never knows when it will be charged with rendering inadequate service, its service investigated, and, if the charge is true, its territory thrown open to a competitor. Outsiders then have reason to hope that if they can show the commission wherein the existing service is inadequate they will get the benefit of their efforts in the form of a chance to give good service themselves. The net result is that the existing company makes an effort to keep its service adequate and extends as rapidly as the public needs justify, for a constant check on its service will be kept by watchful rivals across the border of its territory. Commission supervision alone cannot supply that incentive to good service that the ever present fear of new competition affords. Where the statute does not expressly require favoring the existing utility, the commissions are inclined not to do so where the existing company has been careless about its service in the past though it promises to do better in the future.[175] That the commission has a discretion in the

208 (1928); State v. Dept. of Pub. Wks., 119 Wash. 381, 206 Pac. 21 (1922); State v. Dept. of Pub. Wks., 141 Wash. 168, 250 Pac. 1088 (1926).

[175] *Re* Municipal Light & P. Co., 12 P. U. R. (N.S.) 103 (Ark. Dept. of Pub. Util. 1935); *Re* Harm, P. U. R. 1930E 427 (Cal. R. R. Comm.); *Re* Truckee River Power Co., P. U. R. 1928E 83 (Cal. R. R. Comm.); *Re* Western States Gas & Elec. Co., P. U. R. 1925B 80 (Cal. R. R. Comm.); *Re* Craig, P. U. R. 1928E 60 (Colo. Pub. Util. Comm.).

choice of applicants is generally held in the absence of statute.[176]

If the matter is left to the discretion of the commission, the commission should grant the competing certificate unless it believes the public will be definitely hurt by the competition. The preference of the existing utility, where proper, is not a matter of right in the utility, nor is it, as the Colorado commission intimated, because the investors in the existing utility should be protected against loss.[177] Such loss as they may suffer will be due to their own failure to give adequate service and keep their service abreast of the developing public need. The public interest is the only thing which should be considered, and when it is found that the existing utility has failed to give good service in the past, such utility should not be protected unless the probability of injury to the public is great. The existing utility is quite likely to make the ordered improvement and then settle back in indifference again until another prospective competitor files an application suggesting further improvements.

Upon the filing of an application by an outsider for a motor certificate over a highway paralleling a railroad, it frequently happens that the railroad files a similar application. The argument it makes is that an independent bus or truck line will take necessary revenues from it, while if it, or its subsidiary, is allowed to render the motor service, the revenues therefrom will come into the same pocket which lost train revenues, and so the railroad can continue to serve. The argument in favor of the independent line is that the railroad is not interested in developing motor service but seeks the certificate simply to keep out a competitor and, once it has the certificate, it will sacrifice the development of its motor service in favor of train service. Another argument against giving the certificate to the railroad is that the value of competition as a stimulant to more courteous and alert service is lost. In answer to this contention it is said that the railroad has comfortable stations already available, its personnel has experience in handling passengers, baggage transfer facilities are available, and a railroad operated bus line can give a service better coördinated with train service.[178] The railroad or its subsidiary is generally preferred where

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[176]Batesville Tel. Co. v. Pub. Serv. Comm., 38 F. (2d) 511 (S. D. Ind. 1930); San Diego, *etc.*, Ferry Co. v. R. R. Comm., 210 Cal. 504, 292 Pac. 640 (1930); West Jersey, *etc.*, R. R. Co. v. Bd. Pub. Util. Com'rs, 8 N. J. Misc. 212, 149 Atl. 269 (1930); West Shore, *etc.*, R. R. Co. v. Bd. Pub. Util. Com'rs, 13 N. J. Misc. 180, 177 Atl. 93 (1935); Beaver Valley Serv. Co. v. Pub. Serv. Comm., 122 Pa. Super. Ct. 221, 186 Atl. 304 (1936); Union Co-op Tel. Co. v. Pub. Serv. Comm., 206 Wis. 160, 239 N. W. 409 (1931).

[177]*Re* Quinn, 8 P. U. R. (N.S.) 193 (Colo. Pub. Util. Comm. 1935).

[178]*Re* Chicago, *etc.*, Transp. Co., P. U. R. 1928E 481 (Ill. Commerce Comm.); *Re* Interstate Passenger Service, Inc., 9 P. U. R. (N.S.) 322 (N. H.

to grant the certificate to an independent operator would probably cause the suspension of or reduction in train service and the independent operator could not completely replace the lost train service.[179]

If there are already motor carriers operating satisfactorily in the territory, some states deny a motor certificate to the railroad or its subsidiary.[180] Others permit the railroad to substitute motor service for trains though there is no public convenience and necessity therefor in view of the adequate service of existing motor lines.[181] Others grant the railroad a certificate restricted as to portions of the route now adequately served.[182] The states permitting the railroad to give motor service though an existing motor carrier is serving adequately do so on the theory that the railroad should be allowed to fight for its life. They say that both carriers are in the same field—transportation. Consequently, either should be allowed to give as good service and make its service as convenient to the public as possible, and so should be permitted to substitute modern conveniences and new types of vehicles for antiquated ones.[183] While competition dangerous to ultimate public welfare should be prevented, up to this point it should be free, and though a railroad has, apart from statute, no inherent right to an exclusive motor certificate, the investors in railroad stocks and bonds should be considered to the extent of allowing them to save themselves by competing in the motor field in absence of a clear showing that the public welfare requires them to be held by the commission while the little fellows hit them. It is dangerous to give the railroad exclusive rights in the motor vehicle field, and

Pub. Serv. Comm. 1934); *Re* Wyoming Valley Auto Bus Co., P. U. R. 1925D 332 (Pa. Pub. Serv. Comm.); *Re* Chopp, P. U. R. 1926D 541 (Utah Pub. Util. Comm.).

[179]Chicago Rys. Co. v. Commerce Comm., 336 Ill. 51, 167 N. E. 840 (1929); Stark Elec. R. R. Co. v. Pub. Util. Comm., 118 Ohio St. 405, 161 N. E. 208 (1928); Pub. Serv. Co. v. Rd. Comm., 104 W. Va. 183, 139 S. E. 744 (1927); *Re* Paradox Land & Transp. Co., P. U. R. 1926A 116 (Colo. Pub. Util. Comm.); Wash. R. R. & Elec. Co. v. Wash. Rapid Transit Co., P. U. R. 1922C 754 (Pub. Serv. Comm. of D. C.); *Re* Choate and Tumulty, P. U. R. 1928A 98 (N. J. Bd. of Pub. Util. Com'rs).

[180]N. Y. Cent. R. R. Co. v. Pub. Util. Comm., 123 Ohio St. 370, 175 N. E. 596 (1931); State v. Pub. Serv. Comm., 327 Mo. 249, 37 S. W. (2d) 576 (1931); *Re* Pacific Motor Trucking Co., 3 P. U. R. (N.S.) 402 (Cal. R. R. Comm. 1934); *Re* Pennsylvania General Transit Co., P. U. R. 1931C 383 (Ohio Pub. Util. Comm.).

[181]Central Truck Lines, Inc. v. R. R. Comm., 118 Fla. 526, 160 So. 22 (1932); McJunkin v. R. R. Comm., 122 Fla. 402, 165 So. 368 (1936); *Re* East Bay St. Rys., Ltd., 8 P. U. R. (N.S.) 386 (Cal. R. R. Comm. 1935).

[182]North Bend Stages Line, Inc. v. Dept. of Pub. Wks., 162 Wash. 46, 297 Pac. 780 (1931); *Re* Samoset Co., P. U. R. 1932B 430 (Me. Pub. Util. Comm.); *Re* Worcester Consol. St. Rys. Co., P. U. R. 1925D 35 (Mass. Dept. Pub. Util.).

[183]*Re* Bamberger Elec. R. R. Co., P. U. R. 1928A 116 (Utah Pub. Util. Comm.).

this should be done only as a last resort in saving a necessary railroad service. Nevertheless, the railroad should be allowed to enter the motor field except where to do so will be harmful to the public.

Conclusion

The *Nebbia* case[184] is a definite return to the original conception of the due process clause. It is practically certain that for many years to come the United States Supreme Court will be inclined to sustain a state legislature's regulation of the right to engage in business. More businesses rather than fewer will be regarded as subject to price regulation and regulation of the right to engage in them. If then, a state is free to adopt whatever economic philosophy it thinks best, the economic philosophies of those who make our laws and those who administer and interpret them become increasingly important. It is respectfully submitted that the philosophy of special privileges and monopolies is inherently wrong and deadening to the initiative of the people. Those who hold them become indifferent to the discovery of new methods. Those denied the right to use their discoveries have no incentive to burn any midnight oil in order to make them. Inefficiency sooner or later becomes the inseparable companion of Monopoly, and the pair prevent improvements, courteous service, and an ultimate lowering of cost. The regulated monopoly will not produce all the evils of the old Crown-granted monopolies, but commissions cannot hope to do much more than keep existing companies from slipping back in service and up in rates. Complete freedom of competition brings construction booms resulting in over expansion and unwise multiplication of plants in the same field, with the inevitable result of cutthroat competition and general economic collapse. Yet, competition that is fair destroys only those whose product of service is inferior or too expensive. Competition supplies an incentive for improvement, invention, efficiency and attentive service that no commission, however conscientious and capable, can hope to supply. Where competition is actually harmful to the people as a whole, whether the harm is due to methods of competition or to the amount of it, competition should be restricted and regulated to such extent as is necessary to avoid the harm. Where competition cannot be shown to be positively harmful to the public as a whole it should be permitted.

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[184] 291 U. S. 502 (1934).

THE MISSISSIPPI LAW ON ADOPTIONS

*Catherine N. McFarlane**

Since 1925 twenty-seven states have either enacted new legislation or amended their laws upon the subject of adoption in order to modernize them. But the state of Mississippi still uses a law basically unchanged from the one enacted in 1857.[1] At that time the idea of adoption was very new in the common-law states, although it had long been known in the civil-law states. Adoption as we know it today is defined by the United States Children's Bureau as:

> ". . . . a means of creating the legal relation of parent and child between a child deprived of the care and protection of his own parents and the person wishing to take the child into his own home. It involves the severance of relationships existing between blood kindred and the voluntary assumption of parental obligations through a legal process."[2]

The Mississippi statute provides this legal process, but it has made no step toward the twentieth-century realization that the human aspects of the question may be of greater value to the child than the question of ultimate inheritance.

The Mississippi Code of 1824[3] includes a law passed in 1807, when Mississippi was still a territory, providing that overseers of the poor should be appointed. Among their duties was making returns twice a year to the county courts of the poor orphans and children whose parents "they judge incapable of supporting them and bringing them up in honest ways." They were also empowered to bind out such children as apprentices, but there was no mention of adoption. At that same time there were statutory provisions for "the support and maintenance of bastard children."[4] It is impossible at this point to go into the present-day continuation of the power to apprentice children or into the question of the laws affecting the welfare of illegitimate children without violating the unity of this article. Both are important in the state's system of child care, and the idea of legitimation of offspring born out of wedlock was subsequently combined in the same statute with provision for adoption of children who were not the offspring of the adopting parents.

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[1]MISS. REV. CODE (1857) c. 41, art. 41.

[2]Peck, *Adoption Laws in the United States*, U. S. Children's Bureau, Publication No. 148, 1925, p. 1.

[3]MISS. REV. CODE (Poindexter, 1824) c. 75, § 6.

[4]Statute enacted June 10, 1822.

The first Mississippi statute in which adoption is specifically mentioned is an act passed in 1846.[5] The first section empowers the circuit and chancery courts to change the name of any person "upon good reason shown"; Section 2 gives the power to decree legitimation and heirship of offspring not born in wedlock; and Section 4 gives details of the manner of inheritance of illegitimate children. Section 3 gives the courts power "upon application of any person, and sufficient reason shown, to make any other person the heir of said petitioner." It is this section which is the forerunner of the law in force today.

The present statute is based directly on the one which appears first in the Code of 1857.[6] It is repeated without further change in the Codes of 1871 and 1880.[7] On the surface this law seems not to be unusual, but in an analysis of it in the case of *Beaver v. Crump*,[8] decided by the supreme court in 1898, Chief Justice Woods declares that it is "wholly unlike those of the most of the states of the Union, and is similar in some respects to those of only two states, so far as we have been able to ascertain."[9] In his written opinion on the case cited he interprets it to apply to two distinct situations: legitimation of offspring and making it an heir, and adoption of a child upon which stated benefits are to be conferred.[10] The decision in this case set up a point of law that occurs like a refrain throughout cases under the adoption law: The adoption of a minor under Code of 1880, Section 1496, requiring the benefits to be conferred to be specifically set out, does not include heirship as a benefit, unless specifically conferred.

As late as 1914 this same provision was being cited to show that even though the adopting parent had announced in the preface to the petition his intention of making the child his heir, at his

[5]Miss. Laws 1846, c. 60, MISS. CODE (Hutchinson, 1848) c. 35, art. 2.

[6]MISS. REV. CODE (1857) c. 41, art. 41.

[7]MISS. REV. CODE (1871) art. III, § 525; REV. CODE (Campbell, 1880) § 1496.

[8]76 Miss. 34, 23 So. 432 (1898).

[9]*Id.* at 57, 23 So. at 433.

[10]"In so far as it is an adoption statute it covers two classes of cases: (1) to make legitimate any of the offspring of the petitioner not born in wedlock, and, furthermore and specifically, to decree said offspring thus legitimated to be the heir or joint heir of the petitioner. Heirship for the children of one's own blood born out of wedlock, after their legitimation, is the plain purpose of the law in dealing with such children. (2) to adopt . . . [and change the name of any infant, stating in the petition the benefits to be conferred] there is no heirship embraced in the terms of the statute, unless heirship be one of the benefits proposed to be conferred on the infant by the petitioner. . . . The petitioner may propose much or little, and the adoption decree can only secure to the infant the particular benefits proposed. This is not 'adoption' in the general and unrestricted sense of the term; and the court may even grant the prayer of the petition in part only, as may appear to be for the infant's best interests." 76 Miss. at 57–58, 23 So. at 433.

death the woman who for forty years had been considered his own child did not become his heir because the prayer of the petition did not repeat that heirship was a definite benefit to be conferred, and the decree did not say that heirship was conferred. In his opinion, Justice Cook says, "By the statute the prayer of the petition may be granted in whole or in part, but in this case there was no prayer that the adopted child be made the heir at law of the foster parent."[11] Thus we learn that the benefits to be conferred must be stated not only in the petition but also in the prayer of the petition and must be reiterated in the decree if that benefit is really to be safeguarded to the child. It becomes doubly evident that someone really concerned about the rights of the child in the proposed plan should be at hand to be sure that the vague intentions of the foster parent are actually realized in the decree.[12]

While this feature of the law has remained unaltered, there have been certain changes in jurisdiction and in terminology. Prior to 1890 the circuit and chancery courts had concurrent jurisdiction over adoption cases.[13] The constitution adopted November 1, 1890, provided that the chancery court should have full jurisdiction over "minor's business."[14] In addition it declared that the "legislature shall not pass local, private or special laws . . . providing for the adoption or legitimation of children."[15] The function is placed squarely on the chancery courts.

The statute on adoptions in the Code of 1892, therefore, states that the chancery court shall have jurisdiction and keeps the same two classes of adoption cases which the 1857 statute established.[16] The only difference in the rest of the law is that the first statute required that the "parents or guardians, if living, and resident in the state, shall be summoned," and the later statute drops the "resident in the state" phrase. This omission might make a great deal of difference in interstate adoptions or in cases where the parents had deserted and left the state.

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[11]Leonard v. Weston L'br. Co., 107 Miss. 345, 348, 65 So. 459, 460 (1914).

[12]4 VERNIER, AMERICAN FAMILY LAWS (1936) § 262, comparing the laws of the fifty-one jurisdictions of the United States comments that: "In all but one jurisdiction, Mississippi, it seems clear that the child may inherit from his adoptive parent."

[13]MISS. REV. CODE (Campbell, 1880) § 1830.

[14]MISS. CONST. art. 6, § 159(d). Section 156 had previously designated the jurisdiction of the circuit court as original "in all matters civil and criminal in this state not vested by this Constitution in some other court and such appellate jurisdiction as shall be prescribed by law"; and § 157 specified that "all causes that may have been brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court."

[15]MISS. CONST. art. 4, § 90(i).

[16]MISS. CODE ANN. (Thompson, Dillard & Campbell, 1892) § 492.

In the development of the law three other changes occur. In 1910[17] the legislature amended Section 542 of the Code of 1906, which is identical with Section 492 of the Code of 1892, so as to authorize the adoption of adults. The phases involving legitimation of offspring remain as before, but the subject to be adopted under the second class may be "an adult or an infant." This revised form appears in the Code of 1917 and in the Code of 1930.[18] In February, 1938,[19] the legislature amended the statute to eliminate the necessity for stating in the petition that the child is illegitimate, or for stating the name of the father of an illegitimate child. One other important change made by the same legislative act provides that the consent of the real parents may be waived where the infant is abandoned or deserted, or where the parents are mentally or morally unfit to rear it. The statute also gives the chancellor power to try the case during vacation.

Apparently little litigation on the subject of adoption has reached courts of record in Mississippi, for only eight cases were reported in the Mississippi Reports. Of these cases two have already been mentioned. A second point of law, not discussed previously, was made in *Beaver v. Crump*, which was later cited in a third case. It is that to enforce performance there must be specific description of the action or agreement to be performed.[20] The petitioner had agreed specifically to bestow a certain plantation on the child he was adopting and did so; that is not questioned. But when he died intestate she could not be his sole heir since his further promise had been only to give her that which he did not bequeath to others. Chief Justice Woods held the description to be too indistinct under the circumstances to eliminate all other heirs.

This case was cited in a suggestion of error to the state supreme court in the case of *Adams v. Adams*,[21] decided in 1912. In this case a three-months old infant was adopted by W. W. Adams under a petition and decree that gave him custody and "decreed that he be clothed with all the rights and bound by all the obligations with reference to said child as that of a parent; that said child be clothed with all the rights and bound by all the obligations with reference to said W. W. Adams *and his estate, real and per-*

[17]Miss. Laws 1910, c. 185.

[18]MISS. CODE ANN. (Hemingway, 1917) § 299; CODE ANN. (1930) § 358.

[19]H. B. No. 80, 2 Advance Sheet, Miss. Gen. Laws 1938, pp. 5–6.

[20]A petition for adoption, under MISS. REV. CODE (Campbell, 1880) § 1496, stated that the petitioner proposed to devise to said minor all the balance of his property that he did not specifically devise or bequeath to others. Petitioner died, leaving property undisposed of. The minor brought suit, and prayed for specific performance of the petition as a contract to convey. Held, that the description therein was too indefinite to authorize a decree of specific performance. Beaver v. Crump, 76 Miss. 34, 23 So. 432 (1898).

[21]102 Miss. 259, 59 So. 84 (1912), *sugg. of error overruled*, July 1, 1912.

sonal, at his death, as that of a daughter."[22] Here also, the description of property is vague, but the phrase was construed as definitely conferring the benefit of heirship. Chief Justice Whitfield gave as his opinion that *Beaver v. Crump* was not at all in point because there the statement of heirship was too indefinite; in this case "the decree . . . simply creates, and clearly and definitely creates, the relationship of heir on the part of the daughter."[23]

This case of *Adams v. Adams* is important likewise for two points of law relating to collateral attack on adoption: (1) that in such collateral attack it will be presumed "that the petition presented . . . was presented to the court of the proper county;" (2) that the decree of adoption is good, against a collateral attack, where the mother and the adopting father joined in the petition for adoption, though the petition did not show the name of the father of the infant, or its guardian, or whether they were living, or whether their consent, if living, had been obtained.

This second point was based partly on the idea that the court in an adoption case might act on evidence presented by other means than in the petition. This decision would lead one to believe that an illegitimate child might be adopted in Mississippi without having to give the name of the father or reveal the illegitimate status of the child in the petition. This is now expressly provided by statute.[24] Thus the law is flexible in a direction which present-day child welfare practices deem the right one.

A fourth case had to do with the property rights of an adopted child. In the case of *McLean v. McAllum*,[25] decided in 1923, the statement is made that the antecedent agreements with relation to adoption recited in the petition merge with the proceedings, and that if a request for a review of the adoption proceedings is not filed within two years after the minor attains his majority, the decree is final. In addition, although the petition prays and the court decrees that the adoptive children shall have the rights of natural heirs in the estate, the adoptive father may still cut them off with one dollar in his will and the will be valid so far as adoption proceedings or agreements are concerned. He can treat his own children that way; therefore he can treat his adopted children the same way.[26]

In this case the two children concerned had been living with various unrelated families for about eight years. At the ages of sixteen and thirteen years respectively they accepted the suggestion

[22] *Id.* at 260, 59 So. at 84. Italics supplied.
[23] *Id.* at 265, 59 So. at 85.
[24] H. B. No. 80, 2 Advance Sheet, Miss. Gen. Laws 1938, pp. 5–6.
[25] 131 Miss. 234, 95 So. 309 (1923).
[26] *Ibid.*

of the future adoptive father that they come to live with him and be cared for as his children. In return for their labor on the farm they were to receive support, education, and inheritance of his property just as natural heirs would. For three years they worked without being adopted, then threatened to leave if he did not keep his side of the bargain. The adoption proceedings were accordingly initiated, and adoption and heirship decreed. During the course of the years the children did not receive the education they had bargained for. When they both had attained their majority the adopted father drove them away from home at the point of a gun because they refused to work longer without pay. Later when he died his will revealed he had devised to them only one dollar. This summary is given in detail because the case indicates so clearly the need of an investigation deeper than the "allegations of the petition."

The fifth case, *Fisher v. Browning*,[27] raises the questions of the status of interstate adoptions and the inheritance from their adopted parents. In 1901 a three-year old girl was adopted in Kentucky from a Louisville orphanage by Mississippi residents. At that time Kentucky used a contract proceeding in adoption. In this particular instance the adoptive parents declared that the child was to be their heir, and the adoption was completed in accordance with Kentucky law. The child was brought to Mississippi. In 1903 the adoptive father died. He had one-fourth interest in an undivided estate from his mother, deceased in 1898; and in 1903 the chancery court of the county was petitioned to settle this whole estate and to say whether the adopted child had a part in it. The court ruled that the child, adopted under the Kentucky law, was duly adopted in Mississippi and as such was able to inherit. The child died in 1905. The adoptive mother remarried. She died, and in 1914 the question before the court was whether her second husband inherited the land which had been part of her first husband's estate or whether the blood kin of the deceased adopted child inherited it.

The state supreme court held, in its majority opinion: (1) that the child was adopted in Kentucky and by comity had the status of adoption in Mississippi but did not necessarily have the status of heir thereby; (2) that since land descent goes by *lex rei sitae*, the land in Mississippi would descend by Mississippi law to the wife of the deceased and none to an adopted child whose status as heir was not definite according to Mississippi law; (3) that because the Kentucky system of adoption by recorded contract without judicial sanction was "so inconsistent and antagonistic to our own laws and Constitution," Mississippi was not bound in comity

[27]107 Miss. 729, 66 So. 132 (1914).

to give effect to the Kentucky method of inheritance, and that therefore the child inherited no lands in Mississippi from her adopted father by reason of her adoption; (4) but that the chancery decree of 1903 made the whole thing *res adjudicata,* and therefore the child *did inherit* the land; (5) therefore since the child did inherit the land, and property inherited by an adopted child is in fee simple, upon its death the inheritance goes to its blood relatives rather than to its adopted ones.

It appears that the learned justice came to this decision much against his will and impelled thereto simply by the doctrine of *res adjudicata.* Once reaching the decision, he interpreted adoption as not severing any blood ties but the one between child and natural parents.

A vigorous dissenting opinion by Special Judge Miller argued that the adoption of the child and the fact of her inheritance was not *res adjudicata* because it was not the direct issue involved in the 1903 case. The estate was divided with the wife receiving the deceased husband's fourth just as she would have if no child had existed. He believed that the adoption would not be *res adjudicata* unless it had been directly challenged and made an issue in a case. Continuing, he says, in effect, that even if the question was settled in the 1903 decision, the inheritance from an adopted child should go to its adopted parents if the property did not come originally from its blood relatives. He enlarged on the injustice of allowing property received from adopted parents to go to the blood kin of the adopted child after its decease in infancy to the exclusion of the heirs related by blood to the adopted parents. He maintained, quoting[28] an especially powerful comment on *Van Matre v. Sankey,*[29] that the act of adoption was intended to do more than confer the one benefit of heirship, it was "to create, as between it and such parents [adopted parents], the reciprocal rights and relations of parent and child, and to give to the former both the incidental and the direct advantages of parentage."[30] Thus after the decease of the adopted child the word "parents" in statutes governing descent of the estate should be construed to mean the adopted parents and not the natural parents. He explained that he was writing this lengthy dissent to call the conflict of interpretation to the attention of the legislature in hopes they would pass some specific laws to clarify the matter for Mississippi.

So far as I could determine the subject is still untreated in legislation, but the case itself appeared again before the court in

[28] *Id.* at 748, 66 So. at 139.
[29] 148 Ill. 536, 36 N. E. 628 (1893).
[30] Note (1893) 39 Am. St. Rep. 210, 229.

1917, under the title *Brewer v. Browning*,[31] when the supreme court reviewed it, overruled its former decision, and decided that the status of the child had been settled in the first chancery proceedings because the "prayer of the bill, among other things, asks that 'your honor may adjudicate whether the said Lula May Browning Rule has an interest in the said estate' " and no appeal had been made to the decision given at the time; that the child did inherit in Mississippi by virtue of heirship created by that adoption in Kentucky; and that the property which she left, dying in infancy and without issue, descended to her foster father's heir, his wife, who was her foster mother. Omitting the material relating to the court's policy in permitting the case to come before them again and their refusal to apply the rule of *stare decisis*, we find that the majority opinion, written by Justice Ethridge, cites cases supporting the opinion that "a child adopted in one state under the law of comity has a right to inherit real estate situated in another state even as to lands." The Justice continues:

> "In our view it would be unjust to both parent and child under the adoption made such by the law of one state in which they are given full right of parent and child to hold that the mere fact of moving to another state would upset and unsettle this relationship. It is of the utmost importance that the status of this character should be maintained so far as it is possible to do it without doing violence to the laws and institutions of the state wherein the parties have moved."[32]

The *ratio decidendi* of this case is socially sound.

Concerning the rights of adoptive parents in the property of the adopted child who has died intestate, this case is said to be the only one "of any importance whatever decided along these lines in Mississippi."[33] There is a strongly dissenting opinion written by Chief Justice Smith, concurred in by Justice Sykes, challenging the majority on the overruling of the former case, on interpreting Kentucky statutes in a more liberal way than the Kentucky courts had interpreted them, and on basing the inheritance of adoptive parents on a conclusion reasoned from the law rather than on an exact statement within the law. He maintains that inheritance is a civil not a natural right and as such must be maintained by statute. Only eight of the fifty-one jurisdictions of the United States provide definitely that adoptive parents may inherit from the adopted

[31]115 Miss. 358, 76 So. 267 (1917), *sugg. of error overruled*, 115 Miss. 395, 76 So. 519 (1917); (1917) 85 CENT. L. J. 300; Note (1918) 3 CORN. L. Q. 213; (1918) 18 COL. L. REV. 79.

[32]115 Miss. 358, 369, 76 So. 267, 271 (1917).

[33]Note (1931) 3 MISS. L. J. 238.

child, although the "general tendency of the courts seems to be to infer the intent to permit the adoptive parent to inherit, but to limit it to property received from or through them."[34] Thus we see that although Mississippi is in line with other states in the interpretation of the law, she, with the others, needs to clarify the situation through direct enactment.

The most recent case noted which relates to the adopted child's property rights is *Sledge v. Floyd*,[35] decided in 1925. The question was whether a woman who had been adopted as a child and made the heir of her foster mother could also share the estate of her natural grandfather by participating in the portion which was allotted to the heirs of her deceased natural father. The court held that the adoption proceedings under the laws of this state by which a child was made the lawful heir of the adopting parent does not deprive such child of its right to inherit from its blood relatives when there is nothing in the decree of adoption to show such result was intended. Under such circumstances a child may inherit from both adopted parent and the natural parent.

In Justice Ethridge's opinion, to bar a foster child's ability to inherit from its natural parents would "raise grave questions where a child having expectations should be adopted against its consent or without its power to consent during the tender years of minority and thus be deprived of benefits. There is ample authority for the position that a child may inherit from both natural and adopted parents."[36] This decision is an asset to the protection of the child's rights and welfare.

Of the eight cases which have come to courts of record in Mississippi, only one relates to a question other than property rights. In *Roberts v. Cochran*,[37] decided in 1936, a man who had been separated from his wife in 1931 and had been several years divorced defeated a petition from his wife's parents, joined in by his wife, for the adoption of his seven-year old daughter on the ground that the petition did not state that his consent had been secured. Justice Anderson's opinion contains the statement that because the petition is required to include the statement that the petitioner has obtained the consent of the parents, a petition which does not so state is defective. He continues:

> "Consent of the parents, if living, lies at the foundation of our adoption statute. Jurisdiction of the subject matter cannot be acquired without it. The first step is the

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[34] 4 VERNIER, *op. cit. supra* note 12, § 263.
[35] 139 Miss. 398, 104 So. 163 (1925).
[36] *Id.* at 408, 104 So. at 165.
[37] 177 Miss. 546, 171 So. 6 (1936).

> filing of a petition in the proper court. The petition is jurisdictional in character and must state the facts required to give jurisdiction."[38]

In an effort to support their contention that the consent of the divorced husband was not necessary, the petitioners alleged that he had contributed nothing to the support of the child since the separation and had, in fact, refused to do so. The report of the case mentioned no denial of this by him. But this behavior was ruled out as not pertaining to the question in Justice Anderson's opinion:

> "The decisions of our court with reference to the custody of children have no application in an adoption proceeding. Although the father or mother may be unfit to have the custody of their child, under our statute it cannot be adopted by another without the consent of both of them."[39]

Such a decision created a grave deficiency in the law which the legislature recognized in the last session by amending the statute to eliminate the necessity for consent of the parents where the infant is deserted or abandoned, or where the parents are mentally or morally unfit to rear it.

Of course the relation of parent and child and the child's right to a normal home with both his own parents must be protected at all times. Ordinarily a child with living parents should not be considered really eligible for adoption, even if both parents are willing to give up their rights and avoid their obligations to the child, until all means of rehabilitating the home and the family have been tried. Foster care of the child may be necessary while this attempt is made; but the finality of adoption, severing a child from his natural and customary relationships, makes the step an especially serious one. Yet sometimes a home cannot be reëstablished, or unusual conditions which relate to a particular child make the home grossly unfit for him. In such cases adoption into a carefully selected and suitable home may be the best plan which can be made for his welfare.

Other states have attempted to meet this problem in various ways. Twenty-six of those jurisdictions provide that the consent of parent or parents when they have abandoned the child is not necessary; fifteen provide exceptions when the parents have deserted or neglected the child; and seven, when the parents have been deprived of custody by court order.[40]

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[38]177 Miss. at 552, 171 So. at 7.
[39]*Id.* at 553, 171 So. at 7.
[40]4 VERNIER, *op. cit. supra* note 12, § 259.

There are other questions which also help to reveal the inadequacies of the Mississippi adoption statute. The child's right to inherit from foster parents and natural parents has been established, but many families that adopt children and rear them well leave at their decease estates so small that the property rights of the child are relatively unimportant. But in every adoption there is a living relationship between the foster parent and the adopted child which continues from day to day and affects both the parents and the child. Does our law in any way safeguard the prospective parties to the adoption so that only a mutually satisfactory relationship can be begun? What protection is there, for example, for the intellectual parents who adopt a baby and discover later that he is feebleminded or so mentally dull that he is incapable of taking the place in the social and educational world they had planned for him as their child to take? And what happens to that dull child so placed, who lives always in an atmosphere of personal failure?

Does the Mississippi law consider the effect on the child of the court appearance and the process of adoption? What about the possible use unscrupulous persons have sometimes made of information revealed in adoption cases when court records were not sealed? And what about the real motives of the people who wish to adopt a child? There are people who ask for a child in adoption who really want a toy, or something to dominate, or a weapon to use against wife or husband. There are others who may plan to adopt a child without the real consent of the husband or wife. The statute governing adoption should provide for all these contingencies by express statement and by demanding adequate preliminary investigation, skilled supervision, and a period of probation before the final decree. To do these things Mississippi would need an official agency for child welfare services, which is at present lacking,[41] and provisions in the statute, which are likewise lacking.

An analysis of the present Mississippi statute according to an outline recommended for such studies by the United States Children's Bureau[42] will help to clarify the value of the provision of the existing law and to point out further its specific deficiencies. A comparison with the statutes of the other fifty-one jurisdictions at these points as they are noted in Vernier's *American Family Laws* shows how Mississippi varies from the present trend.

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[41]The plan now developing in Mississippi for joining in the Child Welfare Services program of the Federal Social Security Act through the State Department of Public Welfare may supply this lack. Author's note, April, 1938.

[42]Peck, *supra* note 2, Appendix.

One of the most serious deficiencies is the lack of any kind of investigation by any person or agency to assist the court in satisfying itself that the "allegations of the petition are true." The court cannot be omniscient, but neither can it place complete trust in the expressed motives of persons seeking to adopt children. The Children's Bureau Publication Number 148 formerly cited states that

> ". . . . the most important development in recent adoption legislation is the provision for investigation by the court or through some persons, agency, or board appointed by the court. Especially notable is the plan of referring the matter for investigation to the state board of public welfare or to some similar body well acquainted with the problem of neglected and dependent children."[43]

Without these investigations a court whose judges have no experience in sitting as judges of juvenile sessions is likely to regard adoption as just one of many matters of probate, forgetting that the protection of the child through a study of the case is an obligation resting upon the court. Vernier comments that "statutes in twenty-four of the fifty-one jurisdictions now require a thorough investigation into the matter including the suitability of the child for adoption, and the capability and suitability of those desiring to adopt, to care for, and to rear the child."[44] Later he recommends that

> "It would seem desirable for the statute to specify definitely a particular agency and to equip it for the task. The investigation should be automatically undertaken upon the receipt of a required notice, without the formality of a court order; and a report of the findings should precede a decree by the court."[45]

A recommendation by the agency need not be made binding on the court, but a carefully considered one should be strongly persuasive, for both court and agency are primarily interested in the best welfare of the child.

Mississippi is one of twenty-five jurisdictions providing that "any person" may adopt,[46] and one of fourteen jurisdictions whose law expressly states that either an adult or an infant may be adopted.[47] Both of these permit a wholesome flexibility in adoption cases. Likewise it is good that in the Mississippi statute

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[43]Peck, *supra* note 2, at 17.
[44]4 VERNIER, *op. cit. supra* note 12, at 280, § 254.
[45]*Id.* at 296, § 257.
[46]*Id.* § 255.
[47]*Id.* § 256.

illegitimacy is no bar to adoption of the child by its natural parents. The law is deficient, however, in not requiring some statement of the consent of the spouse of the person adopting if the person is married. The value of such a provision is obvious to anyone who stops to think of the difficult situation of an adopted child whose adoption was not wanted, if not actually opposed by one prospective parent. Forty-one jurisdictions include some statement relating to the consent of the spouse of the person adopting, and nineteen jurisdictions provide for exceptions when the foster parents are separated or one of them is incapable of acting.[48] Both requirements of consent and provisions for exceptional cases should be included in the statute.

Requiring the consent of a child, fourteen years of age and over, to his adoption is another good point.[49] But there should be some provision for considering the active protest of a child between the ages of ten and fourteen years, for sometimes such protest is well-founded and indicates a situation which needs study. Without a thorough investigation by a qualified agency, the child's only safeguard on this point is his appearance in court and his testimony to the presiding judge. Having to undergo such an experience is sometimes painful to a child and may prevent his voicing his real feelings. Therefore a careful prior investigation may secure the desired information with less harm.[50]

With such an investigation few elaborate and absolute requirements even in the matter of parental consent need be laid down in the statute. We have discussed Mississippi's statute on this point. The statute fails to provide the manner in which the consent of the parents shall be presented in court except that the petitioner shall state he has secured it. The same limitation applies to the consent of the child. There is no express provision permitting private or public child-caring agencies to give consent to adoptions except as they may be included under the term guardians. This point needs to be settled definitely.[51] We need either specific statements in the law safeguarding the manner of securing these consents, or an investigation of such a nature that the court can determine from

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[48] *Id.* § 259.

[49] All but ten jurisdictions require consent of person being adopted if of a certain age or over, and twenty jurisdictions set age at fourteen years. VERNIER, *op. cit. supra* note 12, § 258.

[50] *Cf.* Vernier's statement, *op. cit. supra* note 12, at 396, § 260: "In those jurisdictions where there is an automatic investigation into the matter, the appearance of the child decreases in importance."

[51] Vernier comments, *op. cit. supra* note 12, at 345, § 259: "In general it is apparent that in most jurisdictions, the provisions bearing upon consent need a thorough re-drafting. Inasmuch as adoption proceedings are wholly statutory, the provisions of the statutes must be closely followed. It is therefore imperative that their meaning be clear . . ."

it whether the allegations of the petition are true and the adoption is for the best interest of the child.

Mississippi does provide that the natural parents of the child shall be notified of the petition for adoption, but there is no plan for notifying any county or state child-caring agency or registrar of vital statistics of the change of name and status accomplished by the adoption. Since the birth registration is important in many situations in adult life, this notification of a change in name may prevent later confusion.

Mississippi makes no provision for a trial period in the adoption home. Final decree is given at the hearing if the court is satisfied "that the allegations of the petition are true, and that the interest and welfare of the person sought to be adopted will be promoted by the adoption." There is no statement as to the procedure if the court is not entirely satisfied, except that the prayer of the petition may be granted in whole or in part or the petition may be denied. Yet there may be instances when the court would really like to know more about the whole situation and wishes neither to grant nor to deny the petition. The Children's Bureau concludes:

> "Provision for social investigation, for trial period in the home either before a petition is filed or before a final decree is granted, and for state supervision will safeguard the interests of all parties."[52]

Another item which is of utmost importance with reference to the child's welfare is a provision to safeguard the records from publicity. Such a clause protects a child and the adoptive parents from unscrupulous persons who might seek to use items from the child's past for their personal aggrandisement. In nine states provisions have been made recently for keeping records of investigation and testimony confidential.[53] Such records are usually closed by the judge and withheld from inspection except "upon a court order granted for due cause." In at least two of these states it is further directed that the fact of illegitimacy shall not appear upon the records. However New York courts have held that the statement that the child was the offspring of a single woman does not violate this prohibition.

In an attempt to protect the adopting parents some states provide that annulment may take place if

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[52]Peck, *supra* note 2, at 26.

[53]Heisterman, *Summary of Legislation on Adoption*, U. S. Children's Bureau, 1929, 12.

> ". . . within a certain period after the granting of the decree of adoption the child prove to be feebleminded or subject to epilepsy, insanity, or venereal infection due to conditions prior to adoption of which the adopting parents had no knowledge or notice at the time of decree."[54]

And to protect the child recently ten states have provided for annulment "in case the adopting parent has violated his agreement for proper care and treatment of the child."[55]

In like manner some states include a provision for appeal of an adoption decree if within a year someone charges that omission of any of the essential features of the adoption procedure invalidated the adoption. To prevent challenges, those states which provide for omitting parental consent under certain circumstances also provide that in each instance the unfitness must be proved to the satisfaction of the court.[56] Providing for a trial period in the home before a final decree is granted, as the statutes of most of these states require, helps to safeguard the child and the foster parents under conditions which might mean either annulment or challenge.

In addition to these, twelve states now prohibit "parents or other custodians of children from assigning or transferring their rights or duties with respect to children under certain ages except upon court order or as otherwise provided by law."[57] And twenty-four states now provide for state "licensing of child-placing agencies and maternity homes as well as the supervision of placing and adoption of children therefrom."[58] In this way the state, through the courts, may be in control of the whole field. The courts are inescapably handicapped in administering adoption laws with regard for the welfare of the child if there is not equal care in administering related laws governing children's agencies and institutions and the placing of children in family homes.

A few states have recently added the provision that heirship is included as an effect of adoption even when not expressly stated in the petition or decree, and others provide for registration of acts with some designated social or county agency.[59]

The Mississippi adoption statute, we have seen, lacks many of these essential items. Yet nothing in them is inimical to the

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[54]Peck, *supra* note 2, at 10.

[55]Heisterman, *supra* note 54, at 12.

[56]Peck, *supra* note 2, at 12–14. The language of the Mississippi statute is as follows: "[the unfitness] shall be made to appear from evidence touching such matters." H. B. No. 80, 2 Advance Sheet, Miss. Gen. Laws 1938, p. 6.

[57]Heisterman, *supra* note 54, at 4.

[58]*Id.* at 2.

[59]*Id.* at 12, 13.

philosophy regarding child welfare and the court's authority as expressed in the Children's Aid Law, passed in 1928.[60] The law provides for a full social investigation before approving a grant and frequent supervisory visits thereafter. It allows the court to arrange for this service with any local child welfare agency or with a specially appointed unpaid board of five citizens, of whom three must be women, and even permits an agent to be engaged and paid salary and expenses to serve under this board. Placing such active administrative duties upon the court overloaded an already busy chancery bench, but at the time there was no state-wide agency to which the duty could be allotted. When the Federal Child Welfare Services plan provided in the Social Security Act is shared by the state through the State Department of Public Welfare and properly staffed, the chancery courts of the various counties will have the machinery necessary to assist in administering a new and modern adoption law. Some provisions of the present one are good and should be kept. The statute as a whole, though, needs to be completely revised and amended. It is to be hoped that as the consciousness of a need for a complete service for child welfare in the state becomes realized, the adoption statute will be changed to accord with modern discoveries and philosophies relating to children, their needs, and the state's responsibility to them as future citizens.

[60]Miss. Code Ann. (1930) §§ 4011–20.

A SHORT HISTORY OF MISSISSIPPI'S STATE PENAL SYSTEMS

Paul B. Foreman and Julien R. Tatum†*

Many approaches to penology are revealed in the history of the Mississippi State Penitentiary. Its story, which as it unfolds mirrors the economic and political development of the state, falls quite definitely into typical periods. The first, running from about 1809 to 1840, can be pictured as an era of agitation for the centralized detention of convicts in a territorial or state institution. This period was climaxed by the completion of the old East prison, sometimes called "The Walls", on the site of the present state capitol in Jackson. From 1840 to the advent of the Civil War, a period of development, characterized by experimentation with the conventional Auburn cell-block system, was in existence. Following the war crisis and the destruction of East prison by Sherman's men in 1863, came the transition to the leasing system. And from about 1884, the development of protests to leasing practices became increasingly pronounced. The constitutional convention of 1890 heralded the end of this system of operation by making a specific move for its abolition. Following this convention and extending to Governor James K. Vardaman's administration in 1906, came the period of transition to the penal plantations. From Vardaman's administration to the present in a modern period has appeared the gradual formalization of this penal plantations plan, marked by minor operational changes and perhaps most significantly by the startling Brewer investigations of 1913.

Quite regardless of the penitentiary's perhaps more direct aims in detention for punishment, prevention, or reform, its maintenance from an economic view has varied from what has been judged to be an exorbitant waste of public funds to the at least noteworthy condition of being an outstanding source of state revenue. And indeed, from the very first agitation for its establishment and continuing to the present, an underlying economic emphasis—concerned much more with a critical analysis of costs than with services—has been the most realistic key for the understanding of its operation. It is this emphasis, appearing in new definitions as social trends have redefined the economy of the state, which has been the major motivant for such changes as have appeared.

The Period of Agitation, 1809–1840

Even before the admission of Mississippi as a state in the Federal Union, local agitation within the territory for a central

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prison to house all convicts sentenced to relatively longtime terms had begun. Governor W. C. C. Claiborne, addressing the general assembly of 1809, advocated the establishment of a penitentiary, basing his recommendations on the economic utility of centralized detention, but further advising that "the rules of the prison be those best calculated to reclaim the wicked and dissolute."[1] Governor David Holmes in 1820 and G. C. Brandon in 1827 repeated these recommendations to the legislature. Brandon stressed in detail the economic advantage of such an institution, suggesting that the prisoners would not only be self-supporting but that their labor should in the course of time add revenues for the state. He emphasized the reformative effects of prison labor, the view that trade training would remove the economic causes of much crime, and added:

> "Punishment through a spirit of revenge for the infraction of penal laws, are, or ought to be, unknown in a civilized community. The object is to reform offenders, to protect society from the repetition of offense. . . To inflict punishment with no effort at reformation only prepares for the commission of worse crimes. . ."[2]

Governor John A. Quitman in 1836 again sought legislative action for the erection of a central prison. Agitation had been accentuated by the fact that under the existing codes so many crimes were punishable by death that juries commonly refused to convict the accused. An act was passed on February 26 of this year appropriating $75,000 for a state prison which would house at least 200 prisoners and which was to be erected by convict labor.[3] Twenty-eight white prisoners were placed on the roll when the new institution was opened on April 15, 1840. Built to con-

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[1]1 ROWLAND, OFFICIAL LETTERBOOKS OF W. C. C. CLAIBORNE 1801–1816, p. 240, quoted by Shivers, *A History of the Mississippi Penitentiary* (Unpublished thesis in the University of Mississippi Library, 1930) 2–4. Shivers notes that while the counties did provide for the detention of their own criminals in theory, the common practice existed for a county having a strong jail to house prisoners for less established counties. The first public building erected in the territory was a jail at Natchez, the timbers for which were brought up the Mississippi River in November, 1789. While the state in time assumed some control over these institutions, it was only nominal jurisdiction. The early jails were criticized as unsanitary, as being but little safeguard against escape, and as places for the undifferentiated detention of offenders sentenced for any and all crimes. Branding and whipping were also used. See Shivers, *supra*, at 2–4. Coursey and Thomas have also stated, "During the period prior to the establishment of the first state prison, offenders were committed to local jails . . . As today, there was no state supervision . . . No records for the period were available, since they were destroyed by Sherman on his first march through Jackson during the Civil War." Coursey and Thomas in MASON, PUBLIC WELFARE IN MISSISSIPPI (1936) c. 10, p. 1.

[2]2 ROWLAND, ENCYCLOPEDIA OF MISSISSIPPI HISTORY (1916) 364.

[3]Miss. Laws 1836, pp. 20–24.

form to the Auburn system, the first plant contained only 150 cells, three tiers, twenty-five to a row, on each side of the block's corridor. The prisoners were kept at hard labor during the day and in solitary confinement at night. One historian has recorded that, "Each prisoner was furnished a Bible, a mattress and covering, and was forced to bathe once a week in winter, twice a week in summer."[4]

The Period of the Auburn System, 1840–1860

During the earliest days of its operation, most of the prison's productive labor was directed toward maintenance jobs. Bricks, kilned in the yard by convicts, were used in the construction of the prison buildings. As early as 1841 a joint committee of the legislature was appointed to investigate charges of cruelty growing out of the death of a convict. As a result, whipping under any circumstances was abolished, the keeper, who protested at length, being instructed to substitute solitary confinement in dark cells and a bread and water diet.[5] At the end of a fiscal year on November 27, 1843, the institution recorded a profit exceeding $2,900, a little over a hundred dollars of which had been earned by detaining runaway slaves.[6] But free industries in the state, disturbed by this competition, actual or potential, immediately began bitter protests against existing convict labor operation. Citizen's petitions reached the legislature, which ordered substitution of manufacturing of coarse cotton fabrics, bale rope, and hemp and cotton bagging for the former "mechanical" trades. To aid this transfer about $15,000 was spent for a wool-carding machine and a small iron foundry. Profits fell from $5,110.12 in 1845 to a deficit of $884.53 in 1846, but in 1849, the adjustment of labor pursuits being effected, the penitentiary realized a profit of $1,408.84. Governor J. W. Matthews was able to announce that the change had been successful and to recommend the expansion of "the manufacturing department."[7]

Between 1840 and 1847 only 220 convicts were admitted, but by 1852 the prison was so crowded that a number of convicts were worked outside the walls. Forty acres of land near the prison were purchased. From this, the convicts soon cleared over 1,300

[4]Shivers, *op. cit. supra* note 1, at 2; Coursey and Thomas, *op. cit. supra* note 1, at 2.

[5]Miss. Laws 1841, c. 8, § 3. This action is particularly interesting because of the fact that today "the strap" is the major corrective used on the penal plantations.

[6]Shivers notes that before the Civil War convicts were almost all white. An occasional free negro was committed, but slaves generally were considered too valuable to be sent to prison. Sydnor has mentioned the use of jails to detain runaway slaves. See his SLAVERY IN MISSISSIPPI (1933) 67–130.

[7]Shivers, *op. cit. supra* note 1, at 15–18.

cords of wood. The pressure to expand outside labor was considerably augmented in 1857 by the supposedly incendiary burning of the prison factories. Superintendent A. M. Hardin in this year explained an appreciable increase in penal population as being caused by increasing length of sentences. This increase, probably a partial reflection of the increasing population in the state, was to continue until the population in 1859 was to be well above the nominal housing maximum of the plant. This problem was accentuated by the notorious insecurity of the upper tiers of cells. Considering the trend, Governor William McWillie in addressing the legislature exclaimed:

> "I would recommend a modification of the penal code so far as to inflict direct personal punishment on criminals for smaller offenses. Now the punishment often falls on the wives and children as much as on the convict. Many are reduced to pauperism. I have no faith in the penitentiary as a plan for the reformation of convicts; on the contrary, they are schools for vice. They are expensive to the state and in my opinion we have already incurred sufficient expense for the benefit of thieves and other outlaws. No more money should be spent on enlarging the penitentiary in deference to a morbid philanthropy which taxes honest industry for the benefit of felons."[8]

However, the legislature managed a $5,000.00 appropriation for an additional story to the prison cell-block, this alteration providing for fifty-four more cells, including two "dark rooms"—a move which increased the prison's capacity to a grand total of about 200 cells.[9] The same act appropriated $30,000 for factory machinery, but unemployment and the consequent rising cost of detention were at the eve of the war presenting the state with acute problems.

The War Crisis, 1860–1867

Facing the emergency of the war, after attempting for a while to continue the prison's operation, Mississippi chose to abandon the Auburn experiment. Funds for the further rehabilita-

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[8]Miss. Sen. J. (1859) 32, quoted by Shivers, *op. cit. supra* note 1, at 20–24. McKelvey has offered this comment, "The 148 cells, erected at 'The Walls' near the Mississippi state capitol in the early forties *proved adequate for all needs throughout this period and a model cotton mill supplied labor for the well disciplined prisoners and largely paid maintenance costs.* When Texas prepared to erect a prison, one of its commissioners visited The Walls of Mississippi and returned with such a favorable report that the Lone Star State adopted this interpretation of the Auburn system." McKELVEY, AMERICAN PRISONS PRIOR TO 1915 (1936) 33. Italics ours.

[9]Miss. Laws 1858, c. 49.

tion of The Walls were not available. The buildings were also needed for use as a munitions plant. Some twenty-five of the worst prisoners were transported to the Alabama prison in the spring of 1863. Forty were pardoned by the governor and mustered into the Army of the Confederacy. Among the remaining convicts some, particularly older men, were turned out without being pardoned. It was impossible to find quarters for them. A few were distributed among county jails, the state paying for their detention from the prison fund. The immediately renovated plant was operated profitably as a munitions factory for the Confederacy until it was destroyed by Sherman's men on May 17, 1863.[10]

During the constitutional convention of 1865 appreciable favor was voiced for the establishment of the death penalty for all major crimes, but Amos R. Johnston swayed the convention from such drastic measures and carried it in a move to repair the penitentiary.[11] Thirty thousand dollars was appropriated by the legislature on December 5, 1865, for this purpose.[12] This amount would but partially meet the need. It was obvious that additional funds would not be available. A committee on the penitentiary, appointed by the succeeding legislature, recommended that, as a measure to hasten its rehabilitation, the prison be leased for a period of years. An act was approved on October 27, 1866, conforming to this recommendation authorizing the governor to appoint a commission of four with authority to lease the penitentiary, "provided that the aforesaid commissioners shall make no contract by which the control of the convicts may be taken from the state, except during the hours of labor."[13] In October, 1866, the state architect reported that the buildings were sufficiently repaired on funds from the state's appropriation for comfortable use, and estimated that $65,000 would be needed to complete the work. One hundred and thirty-one convicts were held at the time. They were busy with the repairs. Governor B. J. Humphries reported on January 24, 1867, that the penitentiary had been leased under a $100,000 bond to J. W. Young and Co. for fourteen years.[14]

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[10]The board of penitentiary inspectors characterized the prisoners transported to Alabama as "men who were long sentenced and of the most abandoned and desperate characters, Lincolnites of the deepest dye—every man would have deserted to the enemy." Shivers, *op. cit. supra* note 1, at 27, quoting from Miss. Sen. J. (1865) 12.

[11]Journal of the Constitutional Convention of 1865. See committee report and remarks, at pp. 258–65.

[12]Miss. Laws 1865, c. 85, pp. 238–40; see also the historical account in 2 ROWLAND, MISSISSIPPI (1907) 385.

[13]Miss. Laws 1866–1867, c. 146, pp. 212–13.

[14]ROWLAND, *op. cit. supra* note 12, at 385. Rowland interpreted the act cited above as meaning that prisoners were to be worked within The Walls under conditions subject to the approval of state authorities.

The Period of the Lease System, 1867–1895

But almost immediately the modification of the new plan, feared most by its opponents, was introduced. The penal population grew so rapidly that the plant could no longer house the convicts. One hundred and thirty-seven prisoners, including twenty-eight former Union soldiers and seventy-six negroes or mulattoes, were crowded in the old cell-block, which at this time had maximum housing facilities for only one hundred. The roof of the block was still uncovered. Some of the cells were virtually uninhabitable. With such conditions announced, a joint resolution was approved by Governor Humphries on February 21, 1867, allowing the lessees to work such convicts as were without mechanical skill and not sentenced for certain heinous crimes at any work, public or private, upon railroads, levees, dirt roads, or other works. The legislature provided that it might "repeal this act at any time, but no repealing act would be in force for twelve months," that convicts so worked must give their consent in writing, and that they "could not be employed in any work which might impair their health." This arrangement was to be in force for three years, and probably as consideration for it, the lessees were to assume the cost of transporting convicts from the counties to the penitentiary.[15]

Under the authority of Major General A. C. Gillem, Commander of the Fourth Military District, who had driven Humphries from the governor's mansion at the point of bayonets, these agreements were cancelled in 1868 in favor of a contract with Edmund Richardson, who was to become the state's first post-war millionaire. Under the Richardson lease the state paid $18,000 per year to the lessee for feeding, clothing and working the convicts, and bore the expenses of all convict transportation. This cost the state an additional $12,000 annually. Governor James L. Alcorn sharply protested against Gillem's lease in his message to the legislature in March, 1870, observing that though it was to run to November 1, 1870, it could not survive the restoration of civil government. Alcorn, however, extended the Richardson contract, this being confirmed by the legislature for a period ending March 1, 1872.[16]

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[15]Miss. Laws 1867, c. 509, pp. 735–36. For historical accounts in reference to this law which really opened the leasing period, see Miss. Sen. J. (1865) 135, 194, 347; ROWLAND, *op. cit. supra* note 12, at 387–88; Shivers, *op. cit. supra* note 1, at 26–30.

[16]Miss. Laws 1872, c. 75, p. 86. For historical accounts, see ROWLAND, *op. cit. supra* note 12, at 386–87. See also Shivers, *op. cit. supra* note 1, at 30–31, quoting original house records. The Richardson contract gave the lessee specific right to work the convicts outside the state. Concerning the Humphries-Gillem incident, see 2 ROWLAND, MISSISSIPPI, THE HEART OF THE SOUTH (1925) 153–54.

It became immediately evident that the state had bargained poorly with Richardson. The number of convicts was rapidly rising, this particularly due to the great increase in negro convicts. Current opinion was that the state had lost a source of income and at the same time had walked into a huge financial obligation. Governor R. C. Powers, chafing under Governor Alcorn's extension of the Richardson contract and with the penal population numbering 234 convicts in 1872, recommended that the legislature purchase a 500 acre farm-site for a new penitentiary plant and that while contracting within the old penitentiary was to be authorized, outside employment was to be limited specifically to public works. The legislature in response passed an act, approved on March 28, 1872, entirely revamping the penitentiary laws. Ten thousand dollars was appropriated for the purchase of a site and the erection of a plant to house all state convicts. The new law also provided, among other things, that convicts were, upon release, to be given $10 in cash and $15 in clothing and that a reduction in sentence of three days per month be allowed for good behavior.[17] Meanwhile, the governor had authorized the board of prison inspectors to advertise for sealed bids for labor to be used outside The Walls. Only two bids were received, but the inspectors finally accepted one submitted by W. P. Dunnovant and Co. This contract, the first to provide an income to the state, brought a flat $8,000 per year for three years for the use of all convicts and prison machinery, the lessee to assume all prison expenses. Dunnovant for the first time in Mississippi history introduced negro guards. They were reported to be satisfactory by the state superintendent.[18] The panic of 1873, as well as marshalled opposition, stopped the move for a new prison plant. A new cotton factory, authorized for The Walls in 1874, was not completed. At the motion of a taxpayers' convention in 1875, state "chain gangs" were introduced on county roads. It was in 1872 that accounts began to mention the high death rates among convicts worked through subleases on railroad properties and on the plantations in the Mississippi bottoms. Malaria and

[17]Miss. Laws 1872, c. 74, pp. 67–86.

[18]For perhaps the most authoritative, if not systematic report of leasing practices with some mention of the Richardson and Dunnovant contracts, see Jones, *Penitentiary Reform in Mississippi* in 6 PUBLICATIONS OF THE MISSISSIPPI HISTORICAL SOCIETY (1902) 111–28. Jones was active in the later legislature which abolished the leasing system which he characterized as "grafted on the conditions of a defunct slavery. . . It could only have flourished in an ex-slave state where ex-slaves made up the great majority of its convicts." *Id.* at 120. See also, 2 ROWLAND, MISSISSIPPI (1907) 386–87; Shivers, *op. cit. supra* note 1, at 31–32; MCKELVEY, *op. cit. supra* note 8, at 173–75. For historical accuracy it should be noted that the practice of leasing, though used most widely in the South following the war, had been used previously in the United States and in colonial days. See SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (1933).

pneumonia factored heavily that year in the eleven per cent death rate among leased convicts.[19]

In January, 1873, the Dunnovant contract was amended to provide a clear $12 per head to the state for a hundred able-bodied convicts to be worked outside the prison. With the exception of a contract made in 1881, a per capita basis was to become standard in all later leasing. In later contracts the return to the state for an able-bodied leased convict averaged about $50 per year. The population was increasing rapidly and this meant an apparent increased income to the state.[20] Later contracts provided that prisoners should be given good physical care, but there was little or no supervision. Subleasing became the accepted practice and convicts everywhere were worked for the maximum profit obtainable from their labors. Lessees working on public works were given exorbitant "rebates" on convict labor costs. In an effort to appease the sharp protests which were breaking out more frequently in the state press, a board of public works was created in 1880 to supervise leasing. But protests, emphasizing the inefficiencies and brutalities of the leasing system, became increasingly severe.

While the legislature was in session in early 1884, a squad of eighteen convicts was shipped to Vicksburg by steamer from some plantation in the delta to be sent on to the prison hospital in Jackson. They were half-naked and their bodies bore the marks of severe goading. Their fingers and toes were frozen. They presented such a shocking spectacle that the city authorities in Vicksburg refused to permit them to be marched through the streets. They were conveyed in covered wagons to the railroad station. A Vicksburg paper carried a blistering account of this, one which gave the public and the legislature a pointed object lesson. Governor Robert Lowry immediately issued a statement attacking chain-gang brutality and asked the legislature to appoint an investigating committee. This committee in due time issued a detailed and documented review of findings which stressed brutal punishments, bad and insufficient food, open housing sheds with filthy and crowded quarters, which allowed full exposure to inclement weather, overwork, heartless neglect of the sick, and above all, the appalling death rate. The report was published in part by a few newspapers in the state, but it evidently was too much for the strongly entrenched advocates of the leasing system. At any

[19]ROWLAND, *op. cit. supra* note 18, at 388–89.

[20]While in 1872 there were only 234 convicts listed, in 1878 there were 878 colored males, 26 colored females and 92 white males reported as present in the annual census. In the preceding year, 1,408 prisoners had been detained. In 1887 there were 1,012 reported; among these nine hundred were colored and 112 white. See ROWLAND, *op. cit. supra* note 18, at 388; MASON, *op. cit. supra* note 1, c. 10, p. 6; Shivers, *op. cit. supra*, note 1, at 39.

rate, it "disappeared" before the publication of the House Journal for the 1884 session.[21]

Various investigations took place between 1885 and 1888, almost all of them indicating brutality and some giving proof of misuse of funds. The legislature in March, 1886, made a gesture to answer such protests by appointing the existing railroad commission as a board of control with powers of penal supervision to prevent convict exploitation.[22] This particular action was taken because such a large proportion of convict labor was at this time being used in railroad construction. The price of leased labor was fixed at $9 per month for each able-bodied man, and the board of control retained the privilege to cancel leases without notice on evidence of mistreatment. In two instances in 1888 investigations resulted in the return of convicts to the penitentiary hospital, the discharge of supervising sergeants for cruelty, and finally, the cancellation of the lease held by the Gulf and Ship Island R. R. Cited as reasons for this latter action were mistreatment, inadequate clothing and medical care, and unauthorized subleasing. In

[21]Jones, *op. cit. supra* note 18, at 114. ROWLAND, *op. cit. supra* note 18, at 388. Shivers quotes the Raymond (Miss.) Gazette, March 8, 1884, as follows: "Considerable space has been given in newspapers to the report of the joint legislative committee. If the half of what they say is true, and we do not doubt it, Mississippi has been living with a Tewkebury right under the noses of one half her citizens. Prisoners confined within walls, says committee, are kindly treated. But those on farms and public works have been subjected to indignities without authority of law and contrary to civilized humanity. Often, further says the committee, sub-leasers resort to 'pulling' the prisoner until he faints from the lash on his naked back, while the sufferer was held by four strong men holding each a hand or foot stretched out on the frozen ground or over stumps or logs—often over 300 stripes at a time, which more than once, it is thought, resulted in the death of a convict. Men unable to work have been driven to their death and some have died fettered to the chain gang. . . When working in the swamps or fields they were refused pure water and were driven to drink out of sloughs or plow furrows in the fields in which they labored. One instance of this being on the N. O. N. E. R. R. where owners were unable to get contractors to work at a given point known as Canay Swamp. They hired from sub-lessees the labor of convicts at $1.75 per head per day. These were placed in the swamp in water ranging to their knees and in almost nude state they spaded caney and rooty ground, their bare feet chained together by chains that fretted the flesh. They were compelled to attend to the calls of nature in line as they stood day in and day out, their thirst compelling them to drink the water in which they were compelled to deposit their excrement." Shivers, *op. cit. supra* note 1, at 48–49. Shivers' study also contains the story of the lynching of one of Col. Richardson's (now a sub-lessee) guards. Mr. S. T. Wilson, guard, had had trouble with a negro named McDaniel. Wilson forced the convicts under his charge to seize McDaniel, take him on board his ship, beat him insensible, and throw his body overboard. Wilson was tried before a justice of the peace and committed without bail. About 300 negroes formed in an uprising, seized Wilson and carried him into the swamp where he was hanged." *Id.* at 49.

[22]Miss. Laws 1886, c. 25, §§ 7–16. This particular act was passed because of protests concerning the use made by the Gulf and Ship Island R. R. of leased convicts.

1886 the people of Jackson complained to the legislature that administration in the prison was so lax that convicts wandered through the city streets, returning to The Walls only to be present at roll call. This and other complaints had been sufficient cause for the legislature to appoint an interim committee to report on the penitentiary in the 1888 session. When completed, this brief contained all the dynamite of the previous but "missing" summary, and care was taken so that this report was not "lost."[23]

This document, the most detailed summary of experiences with the leasing system in Mississippi, states:

> ". . . We have been compelled almost constantly to guard against a tendency on the part of witnesses on one side to smooth over or suppress facts, and on the other side to exaggerate them. We have most carefully endeavored to arrive at the true state of the case as presented in this report and as a result of our investigations we have arrived at and report the following conclusions which we believe to be fully sustained by the testimony accompanying this report and made a part of it:
>
> We submit that the leasing system under any form is wrong in principle and vicious. Experience teaches us that where human labor is farmed out for a consideration, uncontrolled by any interest the contractor may have in the welfare of the laborer, the laborer is very apt to be worked with a view of the highest possible gain to the employer; and where the power of the employer is absolute, as in the employment of convicts, it is almost certain to be abused in that direction. . . The system of leasing convicts to individuals or corporations to be worked by them for profit simply restores a state of servitude worse than slavery; worse in this, that it is without any of the safeguards resulting from the ownership of the slave. The good treatment of the convict must depend entirely upon the humanity of the person who immediately controls him and we regret to say that the evidence taken by us shows that this sometimes affords but slight protection to convict labor in the hands of contractors.
>
> "If the leasing system is objectionable, that of subleasing is doubly so. The sub-lessee must pay the middleman, the original lessee, a certain profit. That profit is charged up to the labor and is exacted from it in addition to the profit the sub-lessee must make. . . The treatment of convicts under sub-lessees we find has been generally

[23]The full report appears in Jones, *op. cit. supra* note 18, at 120–28.

harsh if not positively cruel. . . [There was] a fearful mortality rate among convicts . . . called in by the Gulf and Ship Island R. R. . . Several convicts were frostbitten . . . [which] could hardly occur in this climate without undue exposure. . .

"The average number of convicts for the year 1886 and 1887 was 738; of these 67 died in 1886, a death rate of 9.08%. The number of deaths in 1887 was 114, a death rate of 15.44%. . . . The superintendent reports 13 killed in attempts of escape and by accident and 30 during the two years from diseases contracted before entering the penitentiary. . . . [But] we can see no excuse for . . . deaths resulting from working convicts in the hot sun who have been enfeebled by long confinement in county jails. . .

". . . In The Walls we find, after diligent inquiry, no cause for complaint. The Walls are the refuge for all cases of chronic illness and for enfeebled and disabled convicts and the death rate . . . is very low under the circumstances. . . The death rate is [about] 2%. . . If the rate in The Walls is deducted from the average death rate, the ratio of mortality in the camps in 1886 is about 7%; for 1887 about 12.4%. . . [This is] very difficult of any explanation consistent with ordinary humane treatment.

". . . We find that instances of cruelty are not uncommon . . . and some, very probably do not come to light on account of the intimidation which seems general in the camps. . . There is no evidence before the committee that lessees counternanced or permitted cruelty to convicts by their subordinates or that it was known to them that abuses occurred; on the contrary it was shown that they forbade all cruel and unusual punishments and abuse. We submit however that the lessees cannot and ought not to be held blameless therefor. They could have informed themselves of any and all abuses by the exercise of ordinary diligence, and they are consequently clearly responsible for much of the abuses practiced because of this negligence. . . Such proof [as included in cited cases] raises a fair presumption that the lessees are at least indifferent to the treatment of the convicts, so long as a satisfactory amount of work is exacted from them. . . The guards . . . work for twelve dollars and a half a month and we submit that such a price for such service can only command a very cheap order of men.

> "It must be borne in mind that abuses are sometimes exaggerated. . . Were it not for a continuance of an abnormal death rate your committee would be disposed to explain many reported abuses in this manner, but the death rate speaks for itself and cannot be explained away."[24]

The committee recommended that the leasing system be abandoned as soon as practicable, and that the state, in addition to restoring a public account plan for manufactured goods (which should, as much as possible, not be allowed to compete with free labor), should look toward "agricultural work" for an outlet for the labor supply. Among other things, a new "good time" law was also recommended.

The penitentiary was a dominant issue in the state's election in 1888. The new state constitution, adopted in 1890, specifically provided that after the thirty-first day of December, 1894, the convict leasing system should be unlawful.[25] The constitutional convention further authorized the succeeding legislature to select land suitable for a penitentiary farm on which convicts were to be worked under the direct supervision of penal authorities responsible to the board of control. The legislature did not act until 1894 when it followed these demands by appropriating $125,000 for the purchase of farm sites and the creation of necessary buildings.[26]

[24]Jones, *op. cit. supra* note 18, at 121–24. This committee further reported while the average terms of imprisonment in "Iowa Additional Prison" was 2 years, 7 months; Illinois State Prison, 3 years, 10 months; Fort Madison Prison, Iowa, 3 years, 12 days; Ohio Penitentiary, 3 years, 2 months, it was 4 years, 7 months, 16 days in Mississippi. Death rates among Mississippi convicts were from ten to thirty times as great as among these prisons and that of New Hampshire. In all the literature it is interesting to note that this high death rate was the central argument advanced by reformers seeking the abolition of leasing. The following table summarizes the Mississippi situation:

TABLE 1—DEATH RATES AMONG LEASED MISSISSIPPI CONVICTS, BY RACE, 1880–1885*

(Rates listed in percentages)

	WHITE CONVICTS			NEGRO CONVICTS		
YEAR	Average Population	Deaths	Death Rate	Average Population	Deaths	Death Rate
6 year average rate	-----	-----	5.30%	-----	-----	10.97%
1880	92	4	4.34%	843	52	6.19%
1881	92	5	5.43%	843	74	8.77%
1882	83	2	2.40%	735	126	17.14%
1883	83	5	6.02%	735	84	11.42%
1884	88	5	5.69%	698	87	12.49%
1885	88	7	7.95%	698	69	10.97%

*Source: Jones, op. cit. supra note 18, at 128.

[25]MISS. CONST. art. 10, §§ 223–25. For a review of this action, see ROWLAND, *op. cit. supra* note 18, at 389.

[26]Miss. Laws 1894, c. 75, pp. 65–67.

After much bickering, the state purchased 3,200 acres in Rankin county, 2,700 acres in the Oakley Plantation in Hinds county and 2,000 acres in the Belmont plantation in Holmes county. The bulk of the prisoners were immediately transferred to these plantations.[27]

The Transition to the Penal Plantation System, 1895–1906

The penal farms were cultivated for the first time in 1895. Although it was an unfortunate agricultural year, the net profit of $60,000 which was realized, served as an immediate force to quell opponents of the farm system. But it was not immediately possible to absorb the labor of all available convicts on the plantations. Those not provided for were worked on two rented and on nine private plantations under sharing contracts. This plan won intense disfavor (particularly because some of the contracts were given to legislators seemingly on a quasi-patronage basis) and led, along with the financial success of the state-owned plantations, to the legislative appropriation in 1900 of $80,000 for the purchase of the 3,789 acre Parchman plantation in Sunflower county.[28] In 1901 four stockades or camps were built here to house convicts and over 2,000 acres were cleared for cultivation. This plant, now valued at approximately $1,500,000, forms the heart of the Mississippi penal system.[29]

During the early part of 1902 the legislature passed an act, which is retained to this day, providing that all receipts of the penitentiary be paid directly to the state treasurer as a credit to the general fund and that disbursements are to be paid by the state treasurer according to the limits of an established legislative budget by warrants from the state auditor approved by a majority of the board of control.[30] In this same year a legislative committee criticized the inefficient books kept by this board and pointed out that most of its members' time was taken by their coördinate duties on the state railroad commission.[31]

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[27]ROWLAND, *op. cit. supra* note 18, at 390.

[28]Miss. Laws 1900, c. 56, pp. 63–66.

[29]ROWLAND, *op. cit. supra* note 18, at 390. Governor James K. Vardaman led protests against the convict-share practice. During 1895 the death rate among convicts actually rose. Since this had been such an important source of criticism for the lease system, much consternation was shown. A detailed report exonerated the management and attributed the rate to an epidemic of measles at Oakley "and other events beyond the management's control."

[30]Miss. Laws 1902, c. 57, p. 54. Created as a protection against graft, this act has been criticized as exploitive since it encourages no use of prison profits for the direct improvement of the penitentiary. For source of such criticism, see GARRETT AND MCCORMICK, HANDBOOK OF AMERICAN PRISONS AND REFORMATORIES (1929); NATIONAL SOCIETY OF PENAL INFORMATION (1929) 527–29.

[31]Shivers, *op. cit. supra* note 1, at 78 ff. Governor Vardaman in his inaugural address of 1904 advocated the abolition of this board and the establishment of a single executive to direct the operation of penal properties.

A committee from the house recommended in 1906 that Oakley, which was to continue for many years to be one of the least profitable plantations, be sold, that the able-bodied negroes at Oakley be transferred to Parchman, and that all sick convicts be concentrated at Rankin. Oakley had maintained the general prison hospital. This committee characterized it as a "huge shack, absolutely unfitted for its purpose." It further recommended that penitentiary affairs be divorced from politics and that civil service rules be adopted. Governor Vardaman told the 1906 legislature that the penitentiary was still a "festering sore" in Mississippi administration. He again sought the abolition of the board of control, the lingering practice of leasing convicts to politically powerful plantation owners on a share basis, and poured fuel on the fire by demanding that Parchman and the auxiliary plantations be adapted for large-scale agricultural experimentation. Despite a powerful opposition and controlling only a third of the senate, he was able to hammer through the legislature a reform program which in a major degree sets the form for present penal operations in Mississippi. He managed to remove the authority of the old board of control, but he had to be satisfied with a new independent board of trustees, rather than gaining the single commissioner he sought. The first board, appointed by the governor, was to serve until the election of 1908, when it was to be succeeded by trustees chosen by the voters. This legislature also ended the lease-for-shares system by forbidding the employment of convicts on lands other than those owned by the state with the exception of work on levees, public works, and public roads.[32]

The Modern Period, 1906–

Governor Vardaman informed the legislature in 1908 that the improvement of the penitentiary management was one of the most gratifying achievements of his administration.[33] His successor,

This was not done. See ROWLAND, *op. cit. supra* note 18, at 390. Vardaman later went so far as to advocate that part of the penal farm profits be distributed among the families of convicts, or if a convict had no family that a portion of his wages above cost of maintenance, be turned over to him at the expiration of his sentence. Vardaman decried the fact that a "system less expensive to the state" had been the only criterion of penal policy, saying, "The prime purpose of the penitentiaries has been overlooked by the board of control. Instead of being conducted for the benefit of criminals . . . the question of making money for the state and the favored few has been the end sought." Miss. Sen. J. (1906) 9–15.

[32]ROWLAND, *op. cit. supra* note 18, at 391–92; Shivers, *op. cit. supra* note 1, at 85–86, contains the account of a legislator's "inside story" of this session. In 1906 it was reported that $335,073 had been spent on the Parchman plantation and that $256,308 had been received from it. Its value was set at slightly over $500,000 with all prison properties valued at $871,669. ROWLAND, *op. cit. supra* note 18, at 392. Note also McKelvey's summary of this transition period. MCKELVEY, *op. cit. supra* note 8, at 188.

[33]Miss. H. J. (1908) 24–25.

E. F. Noel, was able to dismiss the penitentiary in his inaugural message to the legislature with these three short sentences:

> "The state farms are being successfully operated but the number of convicts has outgrown the present capacity. More lands are needed and they shall be provided. The cotton they grow does not have the slightest effect on the general market nor would any less be grown if the state would dispose of its lands to individuals."[34]

Two years later Governor Noel announced the addition of two thousand acres of land to the Parchman plant, advocated the modernization of bookkeeping, drainage of the farms, the introduction of indeterminate sentences, commented that net profits on the plantations between October 1, 1909, and June 30, 1911, exceeded $500,000 and advocated a cotton marketing plan under which sealed bids for the cash purchase of the cotton crops be received from Memphis and New Orleans as well as from state bidders. Cash sale, he believed, would reduce possibility of speculation.[35]

But when Noel was succeeded by Governor Earl Brewer, this new tranquillity in penal operations was abruptly ended. Brewer declined to mention the penitentiary in his inaugural address to the legislature, reserving comment for a special message "because the penitentiary has given the administration more trouble than all other state institutions combined."[36] In his special message he informed the legislature that the penitentiary's expenses had been steadily rising to the point in the year preceding his inauguration that it actually lost money. Becoming interested, Brewer had uncovered a huge graft ring. In an attempt to trace the transactions of the board of trustees, he had made a special trip to Liverpool and Manchester, England in September, 1912, and among other things had hired the Burns Detective Agency and other private investigators to ferret out facts.

Brewer had brought suit against the secretary of the penitentiary for embezzlement, had found that proceeds from penitentiary crop sales had not been returned to the general fund, that some of the penitentiary sergeants had sold both equipment and products and retained the proceeds (he estimated that over $50,000 worth of cotton seed had thus disappeared in 1910 and 1911), and that existing records were such that

> "it would have been impossible to ascertain the number of cars or tons of seed made on the property, except by

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[34] *Id.* (1910) 20.
[35] *Id.* (1912) 22–24.
[36] *Id.* (1914) 8.

> resort to the records of carriers, such as the railroads, who kept their own records in detail for their own use. The system of bookkeeping rendered it absolutely impossible to tell what became of the vast amount of supplies purchased by the board of trustees and hauled away by other people. . . This lives only in the memory of the convicts and others who saw them hauling it away without any idea of the quantity they got. . ."[37]

The Memphis firm which had purchased the majority of the cotton between 1908 and 1912 refused to allow an audit of its purchases, but Brewer held that he could show embezzlement on all available records for the 1908–1912 period and demonstrated that this Memphis firm had been able to make "informed" bids and had hopelessly juggled its cotton shipments from Parchman. He also uncovered fraudulent insurance deals on the cotton crop.[38]

After his cleanup, cotton and cottonseed sales advanced from $246,630.92 to $486,304.90 in one year, and in 1916 he was able to announce

> "the whole system of bookkeeping and checking of this institution has been changed under this administration and if the laws are carried out under the present system of operation, graft and waste will be impossible without detection."

He also reported the expenditure of $150,000 for fireproof convict cages, the first on the plantations.[39]

Since 1916 the history of the Mississippi penal colonies has been without major changes. Several other plantations and two small lime fertilizer plants have been added to the system. While every plantation owned by the state, even including the principal holdings at Parchman, has been recommended for sale by some governor, the state has found it easier to acquire new holdings than to dispose of old ones. Rankin, Oakley, Belmont, and the lime plants at Waynesboro and Okalona have been the most frequently cited white elephants, but sharply decreasing land values in the recent period have discouraged their sale. Some of the minor properties have been recently leased, convicts being transported to the larger delta plantations. The lime kilns, operating

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[37]Miss. H. J. (1914) 65–81, esp. 67–68.

[38]*Ibid.*

[39]Miss. H. Rec. (1916) 42–44. It was just before this time that Dr. Joseph Goldberger had been sent by federal authorities to Mississippi to study pellagra. In his 1916 message Brewer announced the pardoning of the eleven surviving convicts who had participated in Goldberger's epic experiments. See DE KRUIF, HUNGER FIGHTERS (1928) for an account of Goldberger's work.

on a $5,000 budget, produced according to the latest report of a legislative committee, $305 worth of lime.[40] Due to the decreased value of cotton the fabulous profits of former years no longer appear. During 1933 the state lost $122,151.49 on its crop; profits of $173,627.25 and $20,485.92 have been recorded for 1934 and 1935.[41]

The system of operation has not materially changed in the last twenty years. The state uses definite sentences only and has no parole laws. These facts throw a huge responsibility on the governor in use of pardoning power, a fact in which anti-administration state newspapers often find good crusading copy. A pardon board, consisting of five civilians, appointed by the governor to serve in advisory capacity and paid on a *per diem* basis, was active between 1916 and 1924, but it was so authorized that it could at best serve nominally.[42] Several governors have sought the elimination of the board of trustees and the concentration of authority in the hands of a single administrator as Vardaman recommended during the earliest days of the plantation system. The original plan of administrative control for the plantations, consisting of an elected board and a single superintendent appointed by the governor, was somewhat revamped by the 1932 and 1934 legislatures. Under the present system a penitentiary manager, whose only technical qualification is that he "must be an experienced farmer of known executive ability," is appointed by the governor, as are the members of a board of three commissioners, who retain nominal authority in inspection and in the disposal of crops.

The 1929 *Handbook of American Prisons* survey of the Mississippi system commented on the former and perhaps more clumsy division of administrative authority between the board and the superintendent. It stressed the fact that requiring all proceeds to be returned to the general fund and at the same time requiring the administration of the plantations to be entirely dependent on the legislature for appropriations is not conducive to improvement. It also protested against the use of inmates as armed trustee guards and the lingering use of the strap as the major mode of punishment.[43] In addition to these points Gillin has called attention to the neglected potentialities of the plantation system for segregation without resort to a cell-block system.[44] Both of these ob-

[40]Miss. H. J. (1936) 447.

[41]Miss. H. J. (1936).

[42]See Miss. Laws 1916, c. 106, pp. 138–40; Miss. Laws 1924, c. 334, p. 589.

[43]Garrett and McCormick, Handbook of American Prisons and Reformatories (1929); National Society of Penal Information (1929) 527–29.

[44]See Gillin, Taming the Criminal (1933) 257–91.

servers were impressed with the total absence in Mississippi of what, to use Sanford Bates' phrase, might be called "the paraphernalia of reform." In fact the last serious mention of reform as an objective of detention to be found in the official documents of the state appeared in Vardaman's address to the legislature in 1906.[45]

The last available report of a legislative committee on the penitentiary compliments the prison management on its records, stating

> "the method of bookkeeping, so far as we were able to ascertain is A'. It seems that they are keeping the books in such a manner that anyone can call for a report on anything and in a very few minutes it can be produced by the bookkeeper."[46]

The published reports of the institution are, however, both antequated and for the most part unintelligible as a basis for interstate comparisons. Mississippi, Georgia, and Alabama are the only three remaining states in the Union which do not report prison population data in form acceptable to the U. S. Bureau of the Census.[47] By rearranging available data into the general format of U. S. Bureau of the Census reports it is possible, however, to present some population data on Mississippi prisoners, otherwise obtainable only from original records and the several institutional summaries. The general movement of the penal population is reviewed for the period 1920–1936 in Table 2.[48]

In all other published tabulations, data is available only for new admissions. Only rough approximation of standard reporting of offenses causing commitment is possible. The available data, which does not include automobile thefts, underscores Mississippi's high homicide rate. Table 3 reviews the listed offenses for the period 1920–1936, three annual summaries in the period being unavailable.

Race and sex distributions are also available in incomplete form from 1920. See Table 4.

Reports on the age of new admissions and the length of their sentences are available only since 1929, excluding the legal bi-

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[45]See note 31, *supra*.

[46]Miss. H. J. (1936) 446.

[47]U. S. Dep't Commerce, Bureau of Census, Prisoners in State and Federal Prisons and Reformatories 1936 (1938) 3.

[48]Data for all following tables is to be found in the biennial reports of the Mississippi State Penitentiary. No corrections, other than through the reclassification of offenses, have been made. We are indebted to Marvin L. Hutson for assistance in assembling this data from original records.

TABLE 2—MOVEMENT OF POPULATION: MISSISSIPPI STATE PENITENTIARY, 1920–1936[a]

MOVEMENT	1920–1921[a]	1921–1922	1922–1923	1923–1924	1924–1925	1925–1926	1926–1927	1927–1928	1928–1929	1929–1930	1930–1931	1931–1932	1932–1933	1933–1934	1934–1935	1935–1936
Present at Beginning of Year[a]	1152	1307	1577	1530	1407	1389	1480	1604	1559	1721	1841	2068	2232	2428	2547	2639
Received During Year	580	799	622	536	650	695	734	768	874	867	1098	2130[b]		1039	1032	1075
New Commitments	532	738	563	473	557	639	679	688	787	796	995	1840		944	946	973
Returned From Escape	39	47	38	36	69	38	29	41	38	44	70	62	84	69	53	32
Returned From Suspension	0	6	17	22	22	16	26	32	45	23	25	137		24	30	42
Returned by Court Order	2	4	2	0	0	0	0	2	2	0	6	2		2	0	21
Voluntary Returns	7	4	2	5	2	2	0	5	2	4	2	5		0	0	0
Revoked Suspensions	0	0	0	0	0	0	0	0	0	0	0	0		0	3	7
Total Inmate Population	1732	2106	2199	2066	2057	2084	2214	2372	2433	2588	2939	6430		3467	3579	3714
Discharged During Year	425	529	669	659	668	604	610	813	712	747	871	1767		920	940	1061
Expiration of Sentence	219	291	436	367	397	387	408	401	368	402	430	1070		693	659	674
Pardons	59	71	51	137	72	80	67	207	82	53	53	122		6	10	22
Suspensions	46	62	77	43	33	29	50	123	162	187	259	268		116	202	264
Escapes	86	77	85	92	137	79	64	61	70	76	82	113		75	50	44
Released on Court Order	4	5	6	3	7	4	0	2	0	7	8	12		4	0	23
Trans. to St. Industrial School	0	0	0	1	0	2	2	0	0	1	0	0		0	0	0
Died	11	23	14	16	22	23	19	19	30	21	39	51	42	26	19	34
Present at End of Year	1307	1577	1530	1407	1389	1480	1064	1559	1721	1841	2068	2232	2428	2547	2639	2653

[a]By legal years: July 1st-June 30th.
[b]Data available only for biennium.

TABLE 3—OFFENSES OF NEW ADMISSIONS: MISSISSIPPI STATE PENITENTIARY, 1920–1936[a]

OFFENSE	1920–1921	1921–1922	1922–1923	1923–1924	1924–1925	1925–1926	1926–1927	1927–1928	1928–1929	1929–1930	1930–1931	1931–1932	1932–1933	1933–1934	1934–1935	1935–1936
All Offenses	532	738	563	473	557	639	679	688	787	796	995	1840		944	946	973
Homicide	132	d	110	113	122	145	150	118	196	168	179	d	d	162	164	186
Robbery	18	.....	20	9	19	7	14	101	31	47	51	.....	.....	64	60	67
Aggravated Assault	63	.....	57	48	38	39	60	55	55	68	86	.....	.....	103	2	72
Other Assault	2	.....	2	1	0	0	0	35	2	0	0	.....	.....	0	78	30
Burglary	88	.....	95	70	102	138	108	114	155	195	310	.....	.....	362	361	313
Larceny[b]	83	.....	63	57	58	102	102	36	152	139	195	.....	.....	166	149	174
Embezzlement and Fraud	16	.....	11	8	7	11	19	34	8	6	21	.....	.....	4	3	2
Stolen Property	4	.....	2	1	1	5	4	18	6	0	7	.....	.....	0	15	22
Forgery and Counterfeiting	35	.....	16	20	30	28	42	10	39	33	36	.....	.....	14	16	21
Rape	16	.....	11	14	12	8	14	2	7	14	19	.....	.....	11	18	13
All Other Sex Offenses[c]	6	.....	12	13	4	8	9	18	7	12	8	.....	.....	4	3	4
Violation of Liquor Laws	59	.....	158	117	155	131	141	101	113	110	60	.....	.....	19	38	40
All Other Offenses	10	.....	6	2	9	17	16	46	16	4	23	.....	.....	35	39	19

[a]By legal years: July 1st-June 30th.
[b]Auto theft not subclassified.
[c]No admissions listed for prostitution and commercialized vice.
[d]Not classified.

TABLE 4—NEW ADMISSIONS, BY RACE AND SEX: MISSISSIPPI STATE PENITENTIARY, 1920–1936[a]

NEW ADMISSIONS	TOTAL			WHITE			NEGRO			ALL OTHER		
	Both Sexes	Male	Female	Both Sexes	Male	Female	Both Sexes	Male	Female	Both Sexes	Male	Female
1920–1921[a]	532	512	22	132	132	0	400	378	22	.....	.....	.....
1921–1922	738	705	33	207	206	1	531	499	32	.....	.....	.....
1922–1923	563	533	30	169	166	3	394	367	27	.....	.....	.....
1923–1924	473	447	26	149	149	0	324	293	26	.....	.....	.....
1924–1925	557	541	16	183	183	0	373	358	16	1	1	.....
1925–1926	639	.....	.....	219	.....	.....	420	.....	.....	.....	.....	.....
1926–1927	679	.....	.....	227	.....	.....	450	.....	.....	2	.....	.....
1927–1928	688	.....	.....	227	.....	.....	461	.....	.....	.....	.....	.....
1928–1929	787	.....	.....	222	.....	.....	565	.....	.....	.....	.....	.....
1929–1930	796	.....	.....	258	.....	.....	537	.....	.....	1	.....	.....
1930–1931	995	.....	.....	259	.....	.....	732	.....	.....	4	.....	.....
1931–1932	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1932–1933	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1933–1934	944	.....	.....	224	.....	.....	717	.....	.....	3	.....	.....
1934–1935	946	.....	.....	266	.....	.....	679	.....	.....	1	.....	.....
1935–1936	973	.....	.....	241	.....	.....	730	.....	.....	2	.....	.....

[a]By legal years: July 1st-June 30th.

TABLE 5—AGE ON ADMISSION OF CONVICTS RECEIVED FROM COURTS (NEW COMMITMENTS ONLY): MISSISSIPPI STATE PENITENTIARY, 1929–1936[a]

NEW ADMISSIONS	TOTAL	UNDER 15	15–20	20–30	30–40	40–50	50–60	60–70	70–80	OVER 80
1929–1930[a]	796	0	210	284	171	83	32	12	4	0
1930–1931	995	0	184	394	198	123	69	22	3	2
1931–1932[b]	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1932–1933[b]	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1933–1934	944	6	166	428	228	65	36	12	3	0
1934–1935	946	17	174	476	165	67	33	11	2	1
1935–1936	973	25	171	477	192	69	28	9	1	1

[a]By legal years: July 1st-June 30th.
[b]Not tabulated.

TABLE 6—LENGTH OF SENTENCE, NEW ADMISSIONS: MISSISSIPPI STATE PENITENTIARY, 1929–1936[a]

LENGTH OF SENTENCE	1929–1930[a]	1930–1931	1931–1932	1932–1933	1933–1934	1934–1935	1935–1936
Total	796	995	b	b	944	946	973
Under one year	74	61	.....	.....	51	37	33
1 to 2 years	181	215	.....	.....	269	254	230
2 to 3 years	143	192	.....	.....	178	164	157
3 to 5 years	110	175	.....	.....	142	164	190
5 to 10 years	137	203	.....	.....	152	177	197
10 to 15 years	45	40	.....	.....	45	27	55
15 to 20 years	17	12	.....	.....	8	26	15
20 to 25 years	10	10	.....	.....	6	16	10
25 years and over	1	1	.....	.....	3	3	1
Life	78	86	.....	.....	90	78	85

[a]By legal years: July 1st-June 30th.
[b]Not tabulated.

TABLE 7—PLACE OF BIRTH, NEW ADMISSIONS, MISSISSIPPI STATE PENITENTIARY, 1929–1936[a]
(showing only those places contributing 20 or more in tabulation)

NATIVITY	TOTAL	1929–1930[a]	1930–1931	1931–1932[b]	1932–1933[b]	1933–1934	1934–1935	1935–1936
Total All Classes	4,654	796	995	----	----	944	946	973
United States:								
Total	4,645	796	991	----	----	942	945	970
Alabama	222	47	81	----	----	19	35	40
Arkansas	52	10	19	----	----	5	12	6
Georgia	33	10	12	----	----	4	5	2
Kentucky	33	5	11	----	----	7	2	8
Louisiana	197	38	76	----	----	13	33	37
Mississippi	3,813	614	707	----	----	850	805	837
Tennessee	75	13	27	----	----	14	14	7
Texas	50	17	14	----	----	4	11	4
All Other	170	42	44	----	----	26	28	29
U. S. Possessions:								
Total	2	----	1	----	----	----	----	1
Foreign Countries:								
Total	7	----	3	----	----	2	1	2

[a]By legal years: July 1st-June 30th.
[b]Not tabulated.

enniums for 1931–1932 and 1932–1933. Tables 5 and 6. The increasing number of very young convicts recorded in recent years is probably in part due to the fact that the state maintains no institution for delinquent negro youth.

A recording of the nativity of prisoners received in this same period emphasizes the stability of this population. This fact is indubitably weighted by the concentration of negroes in its number. No breakdown is available for race in this tabulation. Table 7 itemizes state of nativity for all states contributing twenty or more convicts in the available five-year reporting period.

One conjecture concerning the future of the penal plantation system in Mississippi seems sufficiently pertinent to record. While it seems probable that no changes will be advocated until the pressure of events might again force the penitentiary into the range of public and political attention, certain factors are now in operation which might underlie this possibility. The penal plantation system has flourished under isolation. Escapes have been relatively infrequent even under conditions of what in other sections of the United States might appear to be lax surveillance, because among other things the geographic isolation of the plantations discouraged them. Mississippi has recently been developing many arterial highways. This trend places the penal plantation in much closer contact not only with the rest of the state but with the nation at large. If this fact encourages an increase in escapes and the escapes become known, it is conceivable that the

public press would immediately strike for reform. Again the rise of cities in Mississippi, a significant current trend, may change the convict group in such a degree that present supervisory systems may be challenged. It is of course impracticable to predict what trend a reform movement might take, but it is probable that if in a period of agitation reformers could uncover sufficient decay in the present operation, a movement, as has been recently developed in other southern states, might be introduced for the reëstablishment of a cell-block system. Regardless of the advantages in increased security which this might have, it is certain that such an occurrence would remove the now neglected special opportunities of the plantation system for pioneering in segregated and individualized penal detention. In such event the folly of allowing the present system to stagnate and of allowing penology to be made subservient to the revenues gained from the plantations could only be seen as a costly error.

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NOTE: The names and addresses of all other officers and members of the MISSISSIPPI STATE BAR ASSOCIATION are contained in the September, 1937 issue of the JOURNAL.

STATE BAR SECTION

[*Items for this section should be submitted to Mrs. Alice Nevels, Secretary of the Mississippi State Bar, New Capitol Building, Jackson.*]

Report of Committee on Selection of Officers

To the President and Commissioners of the Mississippi State Bar:

The committee appointed to study the situation and recommend to the commissioners a remedial plan whereby may be abolished the practice which has to some extent prevailed in the past of some aspirants soliciting votes in their behalf for membership on the board of commissioners in their various districts of the state, met in Jackson, Mississippi, on Friday, November 5th, 1937, at which there were present Gerard H. Brandon, chairman, Hon. J. V. Gipson and Hon. Hugh V. Wall, the three constituting a quorum of the committee. Hon. Charles Snow being engaged in court was unable to attend the meeting, but had expressed his views to certain members of the committee; likewise, Hon. John Brunini was unable to attend this committee meeting, but had communicated his views to the committee.

It was the sense of the committee that no person should seek preferment to any office in the Mississippi State Bar, and that solicitation by any attorney for votes in his own behalf to any office in the State Bar is unbecoming, and any such practice should be condemned.

Your committee directs attention to the provisions of Paragraph 2, Section 24, Chapter 121 of the General Laws of Mississippi for 1932 (whereunder the Mississippi State Bar is organized), whereby the association is given the right to make rules and by-laws not in conflict with the terms of said act concerning the selection and tenure of its officers.

Your committee recommends that a by-law be by the association adopted which shall provide in effect, as follows:

(1) That if it shall be shown that any commissioner or officer of the State Bar has directly or indirectly solicited votes in his own behalf or directly or indirectly made any trade or agreement for votes in his own behalf with any other member, group of members or candidates for such office, he shall be disqualified from holding such office.

(2) That no member of the bar shall knowingly permit any person, friend, or supporter to make any trade or agreement for exchange, promise, or pledge of votes in his behalf for any office in the State Bar, or otherwise to solicit support of votes upon any consideration than the merit of the member of the bar offered for official preferment in the State Bar.

(3) That each officer being elected to office in the State Bar shall make oath before assuming the duties of such office and before being qualified to accept such office, that he has not violated either of the foregoing provisions.

Your committee recognizes that there is no positive cure for the evil sought to be remedied, and believes that no provision can be adopted which will avoid recurrence of the practice sought to be remedied, except by appealing thus strongly to the ethics and morals of those members of the bar who might be inclined to seek by solicitation, trade, or agreement election to office in the State Bar.

Your committee is of the opinion that the provision of Section 21 of Chapter 121, Laws of 1932, whereby members of the State Bar are permitted to cast absent voter ballots for the election of commissioners is tainted with the same evils that affected the practice heretofore existing in general elections and in primary elections in this state under the statute which at one time permitted absent voter ballots to be cast in such elections.

Your committee is of the opinion that the evils now sought to be remedied in the State Bar can be largely avoided by a repeal of that section of the act whereunder the State Bar is organized.

Your committee is of the opinion that only those members of the State Bar who show sufficient interest in the proceedings and activities to attend the annual meetings thereof should be permitted to vote for commissioners, as only such attending members are by statute permitted to vote for the election of other officers.

Your committee recognizes that as a matter of policy it might be inadvisable to present to the state legislature a bill for the repeal of said Section 21; but your committee recommends to the president and commissioners of the State Bar consideration of this question.

This report has been prepared by the chairman of the committee after the meeting thereof on direction of the attending members, and a copy is being submitted to each committee member for approval or criticism of the report as drafted, and each member of the committee is being requested to file with the secretary of the Mississippi State Bar his individual comments upon the same as submitted.

Respectfully submitted,

Nov. 10, 1937

Gerard H. Brandon, Chairman

This is to certify that each member of the above committee has filed with me his endorsement of the above report and said letters of endorsement may be found in the files of the Mississippi State Bar.

Alice Nevels, Secretary

The committee to arrange a program for the annual meeting of the Mississippi State Bar to be held in Vicksburg on June 9th and 10th met in Vicksburg on April 21st and have a very interesting program outlined for this occasion. When each detail of the program has been completed, it will be published in all newspapers in the state. Serving on this committee are R. M. Kelly, chairman, John B. Brunini, and John H. Culkin, Vicksburg; Fred J. Lotterhos and Ross R. Barnett, Jackson; Hugh V. Wall and T. Brady, Jr., Brookhaven; and Frank E. Everett, Indianola.

* * * * * *

The Tri-County Bar Association, consisting of attorneys from Pike, Amite and Walthall counties, met and elected James Ogden of Magnolia as president and Junior O'Mara of McComb as secretary.

* * * * * *

The Attala County Bar has elected David E. Crawley of Kosciusko to succeed the late Thomas Land as president of the association, and H. T. Leonard has been elected as secretary. The association adopted resolutions of respect to the memory of Mr. Land.

* * * * * *

The Lincoln County Bar has been reorganized with T. Brady, Jr., as president, Hugh V. Wall, vice-president, and Robert Lee Jones, secretary-treasurer. The association discussed a number of matters including questions to come before Congress, the legislature and the State Bar convention.

* * * * * *

For some time the president of the State Bar has urged the commissioners to organize district associations, and a wonderful beginning was made in the fourth district when Commissioner Elbert Johnson, with Fred Lotterhos, commissioner from the seventh district, as principal speaker, held a meeting in the Sunflower county courthouse on April 2nd and elected the following officers: Elbert Johnson, Indianola, president; Ben Wilkes, Greenville, vice-president; Alfred Stoner, Greenwood, secretary. A committee consisting of Forrest Cooper, Indianola; Ben Wilkes, Greenville; Arthur Jordan, Greenwood; Edwin White, Lexington; and Victor Montgomery, Belzoni, was appointed to make plans for future meetings not to be held less than three months apart. Plans are well under way for the next meeting of this district association, which will be held prior to the State Bar convention in June.

* * * * * *

Members of the Hinds County Bar Association were entertained at a banquet on April 25th, with L. L. Posey, president of the association, as chairman, and R. M. Kelly of Vicksburg as guest speaker. Fred J. Lotterhos explained the importance of an active association and those in attendance voted to have regular monthly meetings. More than one hundred lawyers were present. Greetings were brought from the circuit court by Judge Julian P.

Alexander, and from the supreme court by Justices George H. Ethridge and Sydney Smith.

* * * * * *

Directors of the Columbus and Greenville Railway Company have elected Robert C. Stovall of Okolona as president of the company to succeed his father, the late A. T. Stovall.

* * * * * *

Dr. A. B. Butts, Chancellor of the University of Mississippi, was the principal speaker at the annual banquet of the Washington County Chamber of Commerce held on March 25th in Greenville. Sam V. Anderson is a member of the directors, and he with Wm. T. Wynn and W. A. Percy served to make this event a success.

* * * * * *

C. E. Slough of Oxford is president of the Junior Chamber of Commerce of that city and is taking a prominent part in the Lafayette County Plant-to-Prosper competition.

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The Houston Chamber of Commerce has elected W. N. Ethridge as president of that organization. Mr. Ethridge is planning a splendid program for the progress of Houston and Chickasaw county, especially in the line of beautification work.

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Orma R. Smith and Frank Hughes are prominent in the activities of the Hillandale Country Club of Corinth. Mr. Smith is president and Mr. Hughes is serving on the membership committee.

* * * * * *

Senator John H. Culkin, president pro tem of the senate and Mrs. Culkin entertained all members of the senate in their home at Vicksburg recently.

* * * * * *

The city of Oxford renamed R. X. Williams mayor of that city on April 27th.

* * * * * *

E. V. Catoe, Jr., formerly of Webb, was received into the Greenwood Rotary Club. City Judge W. H. Montjoy was a guest of the club at this time. Porter Peteet is scoutmaster of the scout troop that the Greenwood club is sponsoring.

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Walter Dell Davis of Winona, member of the Mississippi legislature, was married to Alma Celeste Kimbrough of Morgan City on March 19th.

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The Pilot Club of Jackson has been fortunate in having two prominent attorneys address it on questions of importance. Thomas L. Bailey outlined the state's legislative program, and Cecil F. Travis explained the importance of individual coöperation in the enforcement of law.

The announcement of the formation of a law partnership under the name of Ogden and O'Mara with offices in Magnolia and McComb was issued by James N. Ogden of Magnolia and Junior O'Mara of McComb on April 1st.

* * * * * *

Judge Julian P. Alexander, circuit judge of the seventh judicial district of Mississippi, addressed the University of Mississippi School of Law on April 8th.

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Judge T. C. Kimbrough, dean of the University of Mississippi School of Law, was guest speaker at the dedication ceremonies for the new building at Louisiana State University Law School held April 6-8th.

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J. D. Magruder of Tunica addressed the Memphis Kiwanis Club recently on "Flood Control." Mr. Magruder has been a member of the Yazoo-Mississippi Delta Levee Board for fourteen years and is now serving as vice-president.

* * * * * *

With bowed heads and hearts filled with sympathy for the bereaved relatives, we list among the deceased the following: Lewis F. Owen, Belzoni; C. C. Johnson, Meridian; A. T. Stovall, Okolona; E. G. Williams, McComb; and Thomas Land, Kosciusko.

* * * * * *

A meeting of all alumni of the University of Mississippi Law School will be called at a time and place designated on the official program distributed at the meeting of the State Bar Association.

* * * * * *

Listed below are the recent graduates of the University of Mississippi Law School, all of whom have been admitted to the bar:

E. P. Allen, Silver Creek
Bruce Aultman, Sumrall
F. C. Berger, Port Gibson
E. R. Brock, West
A. G. Busby, Jr., Waynesboro
W. P. Cassedy, Brookhaven
C. T. Coffman, Merigold
J. S. Donald, Jackson
L. R. Eddins, Bay Springs
W. D. Gary, Bellefontaine
Toxey Hall, Jr., Columbia
Bill Jolly, Carthage
E. L. McDonald, Quitman
J. A. McFarland, Bay Springs
P. M. Moore, Oxford
G. R. Neblett, Brooksville
R. S. Newton, Wiggins
W. C. Reed, Jr., Jackson
R. K. Rice, Jr., Webb
W. N. Shands, Jackson
L. J. Sievers, Greenville
W. M. Simpson, Sumner
H. E. Wilson, Columbus
G. F. Woodliff, Jackson

NOTES

Appeals by the State in Criminal Cases and Double Jeopardy

A recent decision of the Supreme Court of the United States has suggested an important phase of criminal law for discussion, and the possibility of a vast change in the criminal procedure of each state.

Defendant was indicted and tried in the state court of Connecticut on a charge of murder, convicted of murder in the second degree. The state appealed under a statute which reads:

> "Appeals from the rulings and decisions of the superior court or of any criminal court or common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the Supreme Court of Errors, in the same manner and to the same effect as if made by the accused."[1]

The trial court's decision was reversed,[2] and defendant re-tried and convicted of murder in the first degree and sentenced to hang. He appealed to the supreme court of the state, where the decision of the trial court was affirmed;[3] and he then appealed to the Supreme Court of the United States, basing his appeal upon the alleged unconstitutionality of the above statute, because of the violation of the due process clause of the Constitution. This Court affirmed the decision of the state court, holding that a state statute permitting appeals by the state in criminal cases is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.[4]

The provisions of the Fifth Amendment clearly prohibit a person from being twice placed in jeopardy of life or limb for the same offense.[5] However, it has been repeatedly held that the Fifth Amendment of the Federal Constitution will apply only to the Federal Government and does not therefore affect the states in their criminal procedure.[6] In the above case the contention of the de-

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[1] Conn. Gen. Stat. (1930) § 6494.

[2] State v. Palko, 121 Conn. 669, 186 Atl. 657 (1936).

[3] *Id.*, 122 Conn. 529, 191 Atl. 320 (1937).

[4] Palko v. Conn., 58 Sup. Ct. 149 (1938).

[5] ". . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; . . ."

[6] In prosecutions by state, indictment may give way to informations filed by or at the instance of public officers. Hurtado v. Cal., 110 U. S. 516 (1884); Gaines v. Wash., 277 U. S. 81 (1927). If by statute, the state elects to do away with the provisions of the Fifth Amendment, and thereby compel the accused to give evidence against himself, it may do so. Twining v. N. J., 211 U. S. 78 (1908). Federal double jeopardy clause does not apply to trial of criminal cases by state. *Ex parte* Dixon, 330 Mo. 652, 52 S. W. (2d) 181 (1932); State v. Bilton, 156 S. C. 324, 153 S. E. 269 (1930).

fendant was not therefore based on a violation of the Fifth Amendment; he did contend however, that the provisions of the Fifth Amendment were carried over and included in the Fourteenth Amendment. It is true that some of the provisions of the first eight Amendments have been so considered, as in the case of freedom of speech and freedom of thought. The Court in this decision does not fix the dividing line between the instances in which the provisions of the first eight Amendments are carried over and incorporated into the Fourteenth Amendment and the instances in which they are not; but the intimation is made that it is to be placed at controversies in which the accused would be subjected to undue and acute hardship if its decision should be otherwise. Thus the Court left itself a wide latitude in the construction of the due process clause and in dealing with state questions arising under the first eight Amendments of the Federal Constitution. The Court had numerous decisions to predicate its decisions upon, these cases holding that the due process of law clause relative to criminal law and procedure is governed by the states themselves.[7]

Since the rendition of this decision by the Supreme Court, little doubt is left but that those few states which do not have express state constitutional prohibitions against double jeopardy, might pass statutes allowing the state to appeal in criminal cases for errors of law in the trial. The decision in this case clears the Fourteenth Amendment from the pathway of state appeals. Therefore, the only method of blocking or prohibiting state appeals in any state which should, by legislative enactment, authorize appeals by the state in criminal cases, would be the provisions of the state constitutions. Because of the great majority of states which have these provisions,[8] however, the number of states allowing appeals have been few in number.

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[7]The requirement of due process of law is met if the trial is had according to the settled course of judicial proceedings. Murray v. Hoboken Land & Improvement Co., 59 U. S. 272 (1855). Due process of law is process due according to the law of the land. This process in the states is regulated by the law of that particular state. Walker v. Souvinet, 92 U. S. 90 (1875). The term due process of law appearing in the Fourteenth Amendment of the Constitution of the United States does not require indictment by a grand jury in a capital case in a state court, and prosecution by information, when authorized by the state law, does not offend against this clause. Hurtado v. Cal., 110 U. S. 516 (1884). The due process of law referred to in the Fourteenth Amendment to the Federal Constitution, restraining state action, is due process according to the constitution and laws of the particular state, provided the fundamental principles of American civil and political institutions are not violated. State v. Felch, 92 Vt. 477, 105 Atl. 23 (1918).

[8]These constitutional provisions, as collected in INDEX DIGEST OF STATE CONSTITUTIONS (N. Y. State Constitutional Comm. 1915) 798, appear as follows:

"No person shall be put twice in jeopardy for same offense.": Ariz., Cal., Colo., Fla., Idaho, Ill., Ind., Mont., Neb., Nev., N. M., N. Y., N. D., Ohio, Ore.; S. D., Va., Utah, Wash., Wyo.

"No person for same offense to be twice put in jeopardy of life or liberty for same offense.": Ark., La., Miss., Okla., S. C., Tex., W. Va.

"No person to be twice put in jeopardy of life or limb for same offense.":

Even though a state might have incorporated within its constitution a prohibition against double jeopardy, all possibility of a statute allowing appeals by the state in criminal cases is not necessarily excluded. The prohibition against double jeopardy, like all other legislative acts, depends upon the judicial construction and interpretation of the constitution by the supreme court of the state.

The common construction placed on double jeopardy provisions of the state and Federal Constitutions, and the one that was well established until recently, was to the effect that once a person accused of crime had been acquitted by a jury, he had been placed in jeopardy and further proceedings by the state based upon the same crime were prohibited. This was the rule of common law,[9] and the construction placed upon state constitutional provisions[10] generally. The famous case of *Kepner v. U. S.*[11] established this in its majority opinion.

Ala., Del., Ky., Me., Pa., Tenn.

"No person shall after acquittal be tried for the same offense.": Iowa, Mich., N. H., N. J., R. I.

"No person after once acquitted by a jury to be again put in jeopardy of life or liberty for same offense.": Mo.

[9]The common law not only prohibited a second punishment for the same offense, but went further and forbade a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been convicted or acquitted. *Ex parte* Lange, 85 U. S. 163 (1873).

[10]Statute giving right to state to appeal after defendant had been convicted, held to be in violation of a state constitutional provision that no person shall be twice placed in jeopardy for same offense. People v. Miner, 144 Ill. 308, 33 N. E. 40 (1893).

State's right to appeal from final judgment in favor of accused is sanctioned by constitution only where motion to quash indictment or motion in arrest of judgment has been sustained. State v. Sherman, 144 La. 76, 80 So. 205 (1918).

A judgment of acquittal is final, and cannot be reviewed on appeal by commonwealth. Commonwealth v. Brown, 202 Ky. 604, 260 S. W. 374 (1924). See also State v. Hart, 90 N. J. L. 201, 101 Atl. 278 (1918); State v. Vincent, 147 Tenn. 457, 249 S. W. 376 (1923); U. S. v. Weissman, 266 U. S. 377 (1924).

The constitutional amendment (art. 8, § 3) did not give legislative power to alter the originally understood meaning of jeopardy in the Bill of Rights. *Ex parte* Bornee, 76 W. Va. 360, 55 S. E. 529 (1915).

The Constitution of the United States declares that no person shall be subject to be twice put in jeopardy of life and limb. The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused whether convicted or acquitted is equally put in jeopardy. U. S. v. Ball, 163 U. S. 662 (1895). If a judgment is upon an acquittal, the defendant will not seek to have it reversed and the government cannot. *Ex parte* Parks, 93 U. S. 18 (1876). See also Lovern v. State, 140 Miss. 635, 105 So. 759 (1925). Where a party has gone through the legal form of a trial, and has by it established his innocence, he cannot be tried a second time for the same offense charged. Hurst v. State, 25 Miss. 378 (1853). Where a verdict of a jury amounts to an acquittal from the offense specifically charged in the indictment, it will bar another prosecution for the same offense. Marman v. State, 24 Miss. 54 (1852).

[11]Defendant was a practicing lawyer of the Philippine Islands and was tried for embezzlement and acquitted in first trial. State appealed and defendant was convicted. He appealed from this judgment to the Supreme

Justice Holmes in the *Kepner* case dissented from the majority opinion with three other Justices, thus making it one of the famous five-four decisions of the Supreme Court of the United States. The subject of double jeopardy was thoroughly discussed in this dissenting opinion and the construction placed upon the clause might well be adopted by state supreme courts as a basis for their construction of such clauses in their constitutions. The argument ran in this manner: "If a statute should give the right to take exceptions to the government . . . it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm."[12] It is just as logical and reasonable to say that the defendant will not be allowed to appeal from the judgment of a jury when it is against him because of the prohibition against double jeopardy. Even though the announcement of this theory in the *Kepner* case is the most outstanding, the view had been expressed before[13] and is only reiterated and endorsed by this famous dissenting opinion.[14] Thus it can be seen that the supreme court of each respective state could very easily and authoritatively adopt the rule that double jeopardy prohibitions in state constitutions will not prevent state appeals, if authorized by statute. It all depends on the construction of the double jeopardy phrase and the belief of the tribunal that such

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Court of the United States. Defendant was discharged and case reversed; decided on question of former jeopardy by a five-four decision. Kepner v. U. S., 195 U. S. 100 (1904).

[12]*Id.* at 135.

[13]The case of State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894), is the first authoritative case in this line and is the basis for many of the later decisions following it, in result and reasoning. Defendant was tried and acquitted on a charge of murder, state appealed and a new trial granted on errors made by trial court. In the opinion of the supreme court it was said that there is but one jeopardy and one trial; that where material error is committed on a trial and a new trial is ordered by the appellate court upon the state's appeal, the second trial is not a new case but is a legal disposal of the same original case tried in the first instance.

[14]Although the question, as dealt with above, was not specifically passed upon by the Court in Palko v. U. S., they made the following reference to the dissenting opinion of Holmes, J., in the Kepner case: "The subject of double jeopardy was much discussed in the Kepner case and although the majority view forbade jeopardy in the same case, if the new trial was at the instance of the government and not upon defendant's motion, the dissenting opinion shows how much was to be said in favor of a different ruling. Right minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the fifth amendment, if it was all in the same case. Even more plainly, right minded men could reasonably believe that in expousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy under such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." Palko v. Conn., 58 Sup. Ct. 149, 151 (1938).

action is necessary to the protection of its people and a better administration of criminal law.

II

Previous decisions have dealt with the possibility of enacting a statute allowing appeals by the state. Is a statute of this nature desirable? It is proposed here to examine reasons for and against the enactment of such a statute.[15]

Many of the present day rules relative to criminal law and procedure were developed from the ancient rules of the sixteenth century, and before. During this period, the defendant was placed at a tremendous disadvantage in the criminal courts; being forced to appear before the courts of criminal administration without counsel, without witnesses, and without the right to be sworn and give evidence in his own behalf.[16] These disadvantages suffered by the defendant, together with the use of torture in the preliminary stages of prosecution, the prejudiced rulings of the judges and the political interest of the government in criminal trials; undoubtedly contributed to the development of the present day rules of criminal procedure. These rules of criminal procedure were developed with the idea of making the position of the persons charged with crime more equal with the government, and with the idea of insuring to every person brought before the criminal courts a fair trial without suffering any of the aforementioned disadvantages. However, this development has gone to such an extent that it is now contended, with merit, that the state is placed in the position formerly held by the defendant and is now at a disadvantage in the trial of criminal cases and in the administration of criminal law. The one phase dealt with here is the right of the state to have an appellate court review the proceedings of the trial court, relative to any possible errors of law appearing in the record of the proceedings of the trial court.

The intervention of the double jeopardy theory to prevent appeals by the state in criminal cases appears to be rather absurd. The result of such rules shows that when the verdict of the jury is in favor of the defendant, the prosecution for this particular crime is at an end no matter what errors of law have been committed by any of the parties concerned and no matter how prejudicial it appears to be to the state's cause. When the verdict is in favor of the state, the defendant has the right of appeal to the higher tribunals for review of all questions decided or rulings made in the course of the trial. Thus, from the former disadvantageous position held by the defendant, it has developed to an advantageous

[15]For a very able discussion of these points, see Horack, *Prosecution Appeals in West Virginia* (1934) 41 W. Va. L. Q. 50. Also, Miller, *Appeals by the State in Criminal Cases* (1925) 36 Yale L. J. 486.

[16]See collection and discussion of authorities on this point in 1 Wigmore, Evidence (2d ed. 1923) 994. See also 3 Chitty, English Statutes (6th ed. 1918) 212.

position where the defendant may refuse to testify without fear of comment thereon by the presiding judge or the acting district attorney, where there is a presumption of innocence in favor of the defendant throughout the trial, where the state is given the burden of proving the guilt of the defendant beyond a reasonable doubt, where the defendant is allowed to use depositions of absent witnesses but this privilege is denied the state, where the state is required to set out its contentions in minute detail and give a list of its witnesses to be used in the indictment but which allows the defendant to keep secret its witnesses and is allowed to raise such issues as insanity during the course of the trial, and which in general insists that it is better for nine guilty men to escape than that one innocent man be punished. Add to this surprisingly strong list of advantages enjoyed by the defendant the right of appeal to the appellate tribunals and the denial of a similar right to the state; and the two positions seem very disproportionate. Even if it be granted that the two positions seem very disproportionate, justification for state appeals in criminal cases would not be completely met were it not for the actual advantage given the defendant by not allowing the state to appeal.

The three principal units of a criminal trial, excluding the defendant, the state and the jury, are the judge, defending counsel and prosecuting attorney. What effect does the rule prohibiting state appeals have upon these three individuals?

Trial judges are frequently inclined to decide close questions of law in favor of the defendant. This condition or inclination on the part of trial judges is readily appreciated and understood when it is considered that the judge is perfectly safe from reversal and from being reprimanded by the supreme court, if he decides all close questions of law in favor of the defendant and if all the doubtful instructions requested by the defendant are given. Trial judges have been known to tell their prosecuting attorneys that they do not propose to take any chances of being reversed by giving instructions favoring the state on points disputed by counsel for the defendant; likewise some trial judges give every instruction requested by the defendant even though the result be to state and restate the same proposition of law and be prejudicial to the state in placing undue emphasis on some possibility of acquittal, with the resulting effect of the jury being falsely impressed thereby. If such practice is followed by the judge and the trial results in an acquittal of the defendant, the record is clear; if it results in a conviction the judge is reasonably sure of being affirmed rather than reversed and reprimanded by the supreme court. Next to the presiding judge, the one person who has best learned the danger of being too free in his speech and his manner of conducting the trial of criminal cases, is the district attorney, who acts of course as prosecutor. Every act and word of the prosecutor during the course of a trial is carefully recorded and frequently reviewed by the supeme court as possible reasons for reversal. Thus, the pros-

ecutor is oftentimes told by his supreme court just how he must conduct the trial of criminal cases and just what he may do and how far he may go in presenting the state's cause to the jury. While the prosecutor is fully aware of this position in which he stands, he knows that the defending counsel across the table from him may be violating practically every rule of practice and ethics and deliberately trying to make him commit reversible error, and at the same time enjoys the advantage of not being afraid of having his actions or words being made the basis for a successful and possibly embarrassing reversal by the supreme court. Nevertheless, the judge and the prosecuting attorney know that the only chance of successful conviction is in the trial court. The position of the defending and prosecuting attorneys may be more clearly illustrated and appreciated when it is considered that in civil cases the actions and conduct of either of the attorneys may be the basis for a reversal whether it be committed on behalf of the plaintiff or the defendant.[17] Likewise, the state is helpless if the prosecuting attorney intentionally commits error in order to insure the accused an acquittal or a reversal on appeal. Also, the state would be helpless from the result of any intentional error committed by the presiding judge because of any ulterior motive.

Probably the most effective result of allowing the state to appeal would be in the conduct of the trial court, since all parties taking part, would know that any action on any person's part would possibly be subjected to appellate review.[18] Successful state appeals in the state under consideration can be based only upon errors appearing in the record on appeal. If the record shows an errorless proceeding followed by a verdict of not guilty, the appellate court could not reverse upon the grounds that the evidence fails to sustain the verdict, as in civil cases, because the prosecution carries the burden of convincing the jury beyond a reasonable doubt, and if the jury says that it is so convinced, the court could hardly say that the jury was not so convinced.

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[17]"The contention may be made that the prosecuting attorney just as frequently engages in unfair speech and conduct as does defense counsel, and that allowing state appeals in criminal cases would only increase these practices. Such contentions are of course only argumentative, for the relative amount of misconduct between defense and prosecution counsel is unknown and with no means of determining such a question. It is true, however, that the errors of the prosecuting attorney are more evident because his record is always subject to appellate review, and it may be a fact that the error for which the prosecuting attorney is reversed or reprimanded, resulted from the deliberate activity of the defense counsel." Horack, *supra* note 14.

[18]"Actual result of allowing appeals in Connecticut by statute, shows that beginning with Volume 82 and including Volume 96 of this state's reports there were seven criminal cases appealed by the state, with five resulting in being affirmed and only two being reversed. During the same time, eighty-two cases were appealed by defendants; resulting in 56 being affirmed and 24 being reversed, appeal being dismissed in one and one resulting in judgment for defendant." Horack, *supra* note 15, at 500. This would appear to rebut any fear of harmful results from allowing the states to appeal.

There is existing today a widespread belief that the criminal administration is a failure to a large extent. It is not here contended that allowing a state to appeal in criminal cases would be the one thing or the one step to be taken in order to remedy this situation, assuming that it does exist. However, it does seem fair to assume that each one of many defects possibly is contributing to this result and that only by finding and remedying a number of them can we hope for substantial improvement; and it is submitted that the reconstruction of our state rules of criminal procedure, thereby allowing the state the privilege of appealing criminal cases on points of law arising in the trial of the cause, would remedy a goodly number of evils now prevailing in the criminal trials of the present day.

III

Even though it be agreed that a state may constitutionally provide for appeals by the prosecution, and that there are strong reasons of policy why it should do so, there still remains the problem of how it may best make this provision. In treating this aspect of the matter it will perhaps be advisable to consider the statutes which many of the states have now passed. The statute of Connecticut is of course at one extreme, allowing the state to appeal and authorizing a reversal if on review it seems justified, so that there may be a new trial of the cause. At the other extreme many of the states refuse to allow the state to appeal for any purpose whatsoever.[19] Some of the jurisdictions allow appeals but only in case of a major offense,[20] others only in case of minor offenses.[21] Some states allow the state to a right of review of judgment in favor of defendant if it be rendered prior to the verdict of the jury.[22] The most common statutory provisions respecting state appeals in criminal cases are to the effect that the state may appeal to settle the constitutionality of a statute,[23] for determination of questions of law to be used exclusively for precedents and not

[19]MINN. GEN. STAT. (1923) § 10756–57; State v. Johnson, 139 Minn. 500, 166 N. W. 123 (1918); State v. Wellman, 143 Minn. 488, 173 N. W. 574 (1919); Prescott v. State, 52 Tex. Cr. App. 35, 105 S. W. 192 (1907); Tex. Cr. Code (1925) art. 812; Commonwealth v. Cummings, 3 Cush. 212 (Mass. 1849); City of Valdosta v. Goodwin, 21 Ga. App. 664, 94 S. E. 812 (1918); Parks v. State, 21 Ga. App. 506, 94 S. E. 628 (1918).

[20]State v. Harrison, 154 La. 1011, 98 So. 622 (1923); Sheridan v. Cadle, 24 Wyo. 293, 157 Pac. 892 (1916). Appeals were not allowed by the state in prosecution under city ordinance, holding that the state has the right to appeal only in cases of violation of state laws.

[21]Commonwealth v. Prall, 146 Ky. 109, 142 S. W. 202 (1912); Commonwealth v. Gritten, 180 Ky. 446, 202 S. W. 804 (1918). Appeals may be taken by state in criminal cases to secure a more correct and uniform administration of criminal law but only where the offense is punishable by fine may there be a new trial.

[22]People v. Swift, 59 Mich. 529, 26 N. W. 694 (1886); Commonwealth v. Capp, 48 Pa. 54 (1864).

[23]ALA. CODE (1923) § 3239; MICH. COMP. LAWS (Ann. Supp. 1922) § 15842; WYO. COMP. LAWS (1910) §§ 6244–45.

for the purpose of subjecting defendant to another trial.[24] Arkansas, by statute, allows appeals by the state to the supreme court for the purpose of "securing a better or more uniform administration of criminal law,"[25] but follows this provision with another section providing that no person after acquittal may again be prosecuted.[26] The statute of Mississippi relative to appeals by the state in criminal cases cannot be placed within the category of either of the extreme views, but it is limited in its nature.[27]

The statute of Connecticut gives the right to the state to appeal only *with the permission of the presiding judge.* Since one of the objectives of allowing the state to appeal is to eliminate the possibility, even though it may seem remote, of giving the trial judge the power to dispose of the case as he may desire, or decide the questions in such a way as to dispose of any possibility of reversal, this seems to be an undesirable element. Otherwise the statute of Connecticut appears to be a very good statement of what the law should be. It will be noted that it provides for appeals only on questions of law decided by the trial court or matters outside the jury's determination. Under this provision there would be no possibility of the supreme court reversing a verdict of the jury unless there appeared errors of law involved in the trial. Also, it is submitted that it would be wise to incorporate into such statutory provision, that the defendant should not be subjected to another trial unless the errors of law appeared to be of a substantial nature and were prejudicial to the state's cause.

Joe A. McFarland

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[24]State v. Pharh, 186 Ind. 589, 117 N. E. 648 (1917).

[25]ARK. STAT. (1921) §§ 3410–11.

[26]*Id.* § 3412.

[27]MISS. CODE ANN. (1930) § 19: "The state or municipality may prosecute an appeal from a judgment of a circuit court in a criminal case in the following cases: (1) From a judgment sustaining a demurrer to or a motion to quash an indictment or an affidavit charging crime; but such appeals shall not bar or preclude another prosecution of the defendant for the same offense. (2) From a judgment actually acquitting a defendant where a question of law has been decided adversely to the state or municipality; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the Supreme Court shall nevertheless decide the question of law presented. (3) From a ruling adverse to the state or municipality in every case in which the defendant is convicted and prosecutes an appeal; and in such case the whole record shall be carried before the Supreme Court on the direct appeal, and the case shall be treated as if a cross appeal had been formally prosecuted by the state. All questions of law thus presented shall be decided by the Supreme Court.

The Mississippi Court and the Doctrine of *Ultra Vires*

Writing in 1894, a leading authority on the law of corporations declared in regard to *ultra vires*:

"After having given a long and attentive study to the subject, the writer affirms that the Anglo-American law with reference to it is in a state of hopeless and inextricable confusion; that contradictory decisions are constantly rendered by the same courts. . ."[1] The cases since the time of the above writing have added very little order to the confusion.

The trouble has been caused by numerous factors. In the first place, courts and other authorities have singularly failed to agree upon the meaning of the term *ultra vires*, or upon the reasons for allowing the defense. Thus the term has been used to include both acts which are beyond the corporate purposes and acts which are illegal or against public policy. The reasons which have been urged in support of the doctrine include among others, the following:

Limited capacity. The theory here is that the corporation, being a creature of statute, is limited in its capacity to act, and that any act outside of that limited capacity is completely void.[2] Opposed to it is the theory that a corporation can do an *ultra vires* or even an illegal act, that the capacity to act should not be limited, but liability for such acts should be the concern of the courts.[3]

Illegality. Some courts, feeling that the legislature has forbidden what it has not granted, advance the proposition in support of *ultra vires* that acts *ultra vires* are illegal.[4] Opponents of this idea hold that when the want of corporate authority is the sole objection to a given transaction, illegality is not involved. The word "illegal" is used somewhat indiscriminately by the courts to indicate not only acts *ultra vires*, but acts forbidden by statute to corporations, and acts illegal of themselves—though done by corporations or individuals.[5]

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[1]Thompson, *Doctrine of Ultra Vires in Relation to Private Corporations* (1894) 28 Am. L. Rev. 376.

[2]Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 59 (1890). And in Williams v. Creswell, 51 Miss. 817, 822 (1876), the Mississippi court said: "A corporation in this country, being the creature of positive law, has such power as is conferred upon it, and cannot make a particular contract unless the power is given expressly or by necessary implication." The court spoke of Commercial Bank v. Nolan, 7 How. 508 (Miss. 1843), and Bacon v. Miss. Ins. Co., 31 Miss. 116 (1917), as authorities for this statement.

[3]Bissell v. Mich. So. & N. I. R. Co., 22 N. Y. 258, 263, 264 (1860).

[4]St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 39 (1891).

[5]For discussion, see Ashbury Ry. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, 672 (1875). Numerous Mississippi cases have talked in terms of the doctrine of *ultra vires*, when the acts performed were probably illegal in the strict sense of the term. See, *e. g.*, Watts Mercantile Co. v. Buchanan, 92 Miss. 540, 46 So. 66 (1908) (statute forbade any corporation to purchase franchise, *etc.*, of another corporation); Middleton v. Georgetown Mercantile

Public policy. It is advanced sometimes by those favoring the doctrine that it is for public good that *ultra vires* acts of corporations should be held void and thus discouraged. The conflicting theory in regard to public policy is that it is unwise to allow *ultra vires* to be set up as a defense to a contract honestly made, security in business dealings being always desirable.[6]

Constructive notice. It is said that the corporation charter is open to the public and serves as constructive notice to the public of the limited powers granted the corporation.[7] The opponents of this theory urge that its principal defect lies in its impracticability.[8]

Protection of intra vires creditors. The idea here is that the creditor, in contracting with the corporation, relied upon the presumption that the corporation would utilize its assets only by *intra vires* acts.[9] The argument against this theory is partially based on grounds that it would be unwise to allow *intra vires* creditors to rule corporate affairs, which would be the ultimate conclusion of such theory.[10]

Protection of shareholders. It is proposed that shareholders can be bound only by those *ultra vires* acts which they have ratified by unanimous consent or silent acquiescence. This theory is largely

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Co., 117 Miss. 134, 77 So. 956 (1918) (statute prohibited acquisition of land by corporation for agricultural purposes); Merchants & Planters Packet Co. v. Streuby, 91 Miss. 211, 44 So. 791 (1907) (corporation prohibited by law from owning capital stock of another); McIntyre v. Ingraham, 35 Miss. 25 (1858) (statute forbade assignments of paper by banks); see also Mobile & O. R. R. v. Franks, 41 Miss. 494 (1867), discussed in note 6, *infra*.

[6]*Cf.* Farmers' & Mechanics' Sav. Bank v. Crookston State Bank, 169 Minn. 249, 210 N. W. 998 (1926), where court weighed public policy involved. In Mobile & O. R. R. v. Franks, 41 Miss. 494 (1867), the court held invalid a contract made with a common carrier which provided that goods were shipped at owner's risk. A statute provided that the liability of a common carrier was to remain as at common law, notwithstanding private contracts limiting liability. Miss. Laws 1863, c. 29, p. 146. The court stated that the statute was passed on grounds of public policy and for the express prohibition of this type contract, and that thus the contract was invalid. Note that the public policy involved here was that applying to common carrier liability, and not as regards *ultra vires*.

[7]McCormick v. Market Nat. Bank, 61 Ill. App. 33 (1896), *aff'd*, 162 Ill. 100, 44 N. E. 381, *aff'd*, 165 U. S. 538 (1897).

[8]Bissell v. Mich. So. & N. I. R. Co., 22 N. Y. 258, 281 (1860).

[9]Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 731, 61 Atl. 167, 170 (1905).

[10]Mills v. Northern Ry., L. R. 5 Ch. App. 621, 628 (1870). Gulledge v. Woods, 108 Miss. 233, 241, 66 So. 536, 537 (1914), involved a suit against a corporation as indorser of a promissory note, and was brought by trustee of bankrupt corporation, as "representative of the creditors." The court cited 3 THOMPSON, CORPORATIONS (2d ed. 1908) 2849, "that a creditor should not attack a corporate transaction as *ultra vires* merely; can assail the act only on the ground that its intent or effect is to fraudulently divert the corporate assets from his debt; he must charge fraud." The court then held that the bill in its averment was inadequate to show that the holder, defendant here, knew of the alleged fraud.

determined by the law of agency, and by the policy of the courts regarding *ultra vires* contracts.[11]

It may be added that while these arguments have all been advanced in favor of the doctrine, in most cases no reason at all was given for favoring or denying the defense, the court merely discussing the problem at hand as to whether or not the doctrine was such that the defense should be allowed.[12]

Another factor contributing to the confusion on this subject was the early attitude of the court that *ultra vires* acts were "usurpation" of power which had not been granted to the corporation. This attitude has gradually undergone a change, the altered viewpoint being shown to a certain extent in the later cases; but it is more noticeable in the writings of textbook and law journal authorities, and more apparent still in the recent statutory legislation on the subject. This legislation, enacted by several states, has tended to deny *ultra vires* as a defense.[13]

There is no statute in Mississippi concerning *ultra vires*. What is the condition of the law in this state as it is announced by the cases? Is Judge Thompson's indictment quoted above justified by the Mississippi authorities? First, let us see what the court

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[11]*Cf.* Prairie Lodge v. Smith, 58 Miss. 301, 308–09 (1880): "The question presented is different from that which would be presented if the contract were made by the managers without the consent of the corporators, and also without the powers specified in the charter. In that case the stockholders, as principals, might personally be allowed to aver the want of power in their agents, the managers, to bind them, and that they had been thus compelled to enter into a business outside the scope of their agreement."

For cases in Mississippi involving corporations and their agents, see: Doherty v. Price Mercantile Co., 132 Miss. 39, 95 So. 790 (1923); Pullman Palace Car Co. v. Lawrence, 74 Miss. 782 (1897); Rivers v. Yazoo, *etc.*, R. Co., 90 Miss. 196, 43 So. 471 (1907); Methodist E. Church v. Vicksburg, 50 Miss. 601 (1874); Metzger v. So. Bank, 98 Miss. 108, 54 So. 241 (1910); Wells v. Neill, 162 Miss. 60, 138 So. 569 (1932).

[12]No claim for originality is made as regards the foregoing introductory matter. For similar analysis, see Carpenter, *Should the Doctrine of Ultra Vires be Discarded?* (1923) 33 YALE L. J. 49, and STEVENS, CORPORATIONS (1936) §§ 71–76.

[13]In 1928, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Business Corporation Act, §§ 10 and 11 applying to *ultra vires*. Idaho adopted these two sections without change; see IDAHO CODE (1932) §§ 29-113, 29-114. For other legislation denying the defense in whole or in part, see: ILL. ANN. STAT. (Smith-Hurd, 1935) c. 32, § 157.8; La. Laws 1928, act 250, §§ 11, 12, GEN. STAT. (Dart, 1932) §§ 1091, 1092; MICH. COMP. LAWS (Supp. 1933) § 10135-11; Minn. Laws 1933, c. 300, §§ 10, 11; OHIO GEN. CODE (Throckmorton, 1930) §§ 8623-8, 8623-9; Pa. P. L. 1933, no. 106, p. 364, § 303; PA. STAT. (Purdon, 1936) tit. 15, § 2582—303; Vt. P. L. 1933, §§ 5813, 5817 (Laws 1915, no. 141, § 15); WASH. REV. STAT. (Remington, Supp. 1935) §§ 3803—10, 3803—11. California has gone fartherest of any state so far in denying the doctrine; the California statute was drafted by Ballentine in 1929, who at that time said: "The doctrine of *ultra vires* is abolished." Ballentine, *Changes in the California Corporation Laws* (1929) 17 CALIF. L. REV. 529, 532. See CAL. CIV. CODE (Hillyer's Cons. Supp. 1931) § 345.

has said. We may perhaps then find it worth while to see whether what it has done corresponds with what it has said.

Concerning a partly executed contract, the court used the following language in *Watts Mercantile Co. v. Buchanan*:[14] "That kind of plunder which holds onto the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition in the laws of this state. . . If it be true that the federal courts would hold differently, we respectfully decline to follow them." But one year before, in *Merchants & Planters Packet Co. v. Streuby*,[15] an almost identical case, the court had said: "This oil mill is a corporation, and so it was powerless in this state to subscribe for stock of another corporation. . . We have, therefore, not a case where the principal was or could have been bound in any event by the subscription, it being *ultra vires*."

In *Commercial Bank v. Nolan*,[16] decided in 1843, the court said: "It would be extremely inconvenient if every contractor with one of these banks could, for the purpose of avoiding his contract, institute the inquiry whether the bank had violated its charter. . . The contract on the part of the bank is executed, and the opposite party is secured in the enjoyment of the fruits beyond disturbance. How then can he object to want of power?" Yet, in *Greenville Compress & Warehouse Co. v. Planters Compress & Warehouse Co.*,[17] in 1893, the court stated that "The decided weight of authority in England and America is that no action lies upon the invalid contract, that no decree can be made by a court of equity for its specific performance, nor a recovery had at law for its breach." However, in *New Orleans & N. E. R. Co. v. Jemison*,[18] in 1926, the court cited the above statement from the *Nolan* case and approved it. Then, the court cited the *Watts Mercantile Co.* case and stated that that case decided "First, a corporation cannot accept the benefit of an *ultra vires* contract and repudiate it when sued thereon; and, second, an action on the contract will lie." The court then stated that when a contract with a corporation is merely *ultra*

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[14]92 Miss. 540, 544, 46 So. 66, 67 (1908).

[15]91 Miss. 211, 216, 44 So. 791 (1907). These cases seem *contra* from their language, but might be explained on this basis: the 1907 case dealt with the facts at hand from the viewpoint that the *ultra vires* contract was illegal—being prohibited by statute. The 1908 case did not consider the angle of illegality, but merely dealt with the situation as a purely *ultra vires* defense. This question of illegality was not actually discussed by either court, but the fact that there was a statutory prohibition of the type contract involved might have influenced the 1907 court. For case discussing effect of statutory prohibition, see McIntyre v. Ingraham, 35 Miss. 25 (1858). Note that the Watts case expressly refused to follow the federal rule. But the federal courts are frequently cited both to deny and to uphold the defense. *Cf.* Greenville Compress v. Planters' Compress, 70 Miss. 669, 676, 13 So. 879, 880 (1893), and New Orleans & N. E. R. Co. v. Jemison, 144 Miss. 890, 898–99, 110 So. 785, 787 (1926).

[16]7 How. 508, 535 (Miss. 1843).

[17]70 Miss. 669, 676, 13 So. 879, 880 (1893).

[18]144 Miss. 890, 898, 110 So. 785, 787 (1926).

vires, and not illegal, and when the party suing has executed his part, the defendant may not avoid the contract by a plea of *ultra vires*.

In *Fargason v. Mercantile Co.*,[19] a 1900 case, the court said that the state alone could complain of the following *ultra vires* acts of a corporation: the loaning of too much money to a borrower; the beginning of business before a sufficient amount of capital stock is paid in; the carrying on of business with an insufficient number of directors. "Even if the concern should be carried on without any charter at all, it cannot be that its creditors would be powerless to collect from it, or that it could not pay its debts." But in *Bacon v. Miss. Ins. Co.*,[20] in 1856, the court had said: "The execution of the note by the corporation was unwarranted by its charter, and no presumption can be entertained as to the validity of an act not expressly authorized by the charter, nor warranted by necessary implication."

In *Hinds County v. Natchez R. R. Co.*,[21] the court said: "The first ground of attack on the sale is that . . . the Louisville, New Orleans & Texas Railway Company had no authority under the act or under its own charter to buy. It is sufficient as to this to say that whatever complaint might be made by creditors of the selling corporation or stockholders of the purchasing company or by the state in its sovereign capacity, this objection cannot be made by the selling company or its stockholders." But in *New Orleans, J. & G. N. R. R. Co. v. Harris*,[22] the court declared: "When a person becomes a member of an incorporated company by his subscription to the stock, he agrees to be bound by the terms of his contract, as defined in the charter of incorporation; he agrees to be bound by the acts of the corporation and its officers, performed within the scope of the charter powers; but upon no principle can it be held that he impliedly consents to any alteration which would work a radical change in the structure of the association, which might be voted or accepted by even a majority of the whole of the corporators, and thereby be subject to burdens and obligations wholly foreign to the purposes and objects of the original charter. It is our opinion, therefore, that the act of acceptance was absolutely void for want of power on the part of the stockholders representing a majority of the stock to vote an acceptance of the amendatory act. It follows hence that the transfer and assignment were also void and ineffectual."

The few instances of court language cited above have been picked more or less at random. From them, it would seem that Judge Thompson is justified in his indictment—at least by the

[19] 78 Miss. 65, 73, 27 So. 877, 879 (1900).
[20] 31 Miss. 116, 118 (1856).
[21] 85 Miss. 599, 629, 38 So. 189, 191 (1904).
[22] 27 Miss. 517, 540 (1854). Note that these two cases might be distinguished on the basis of the differing court opinions regarding the binding effect of majority action *in re* corporation stockholders.

Mississippi authorities. The language of the courts is not reconcilable; but such language, in many cases where it upheld the doctrine, seems to have been only lip-service. This statement is based on the fact that while the language favored *ultra vires*, most of the final holdings declined to allow it as a defense in the particular case before the court. This was done either by distinguishing the case on the facts, or by utilizing one of the loopholes in the doctrine.

One method of avoiding the application of the doctrine, while pretending to uphold it, has been to hold that the contract is within the implied powers of the corporation in that it is in furtherance of the business for which purpose the corporation was created.[23] Obviously, a judge might exercise a great deal of discretion in determining whether an act was in furtherance of granted powers or not. Many of the cases discussing the problem from this viewpoint have held the contract at hand to be in furtherance of business.[24]

Another method of pretending to uphold the doctrine while actually denying it was perhaps first effectively used in Mississippi in 1843,[25] but was much more clearly expressed in the case of *Haynes v. Covington*[26] in 1850. There the court said: "If a corporation make a contract entirely foreign to the purposes of its incorporation, the contract is void for want of power in reference to the subject-matter. . . But where a corporation enters into a contract in reference to a subject embraced within the scope of its granted powers, but in so doing exceeds them, the contract will not thereby be rendered void." After making this statement, the court proceeded on a somewhat different theory, holding that the contract was within the implied powers of the corporation, and holding that even if not within such implied powers, the corporation would be forced to return money borrowed on such contract—though the contract be held irregular or even "illegal."[27] The statement by the court which opened the door to much future avoidance of the doctrine was that one in which the court said that though a contract foreign to the purposes of incorporation was void, the fact that an act exceeded the powers granted did not render it void, and

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[23]*Cf., e. g.*, Betlyn Securities Corp. v. Bates, 177 Miss. 41, 170 So. 301 (1936), and Mobile & O. R. R. v. Franks, 41 Miss. 494 (1867). See also Gaines v. Coates, 51 Miss. 335 (1875), where court considered what it called "extraordinary powers".

[24]In Gulledge v. Woods, 108 Miss. 233, 66 So. 536 (1914), it was held that corporation engaged in mercantile business, with full power under charter to borrow and lend and receive and execute securities in carrying on such business, could, as necessary incident, become party to negotiable paper, and here indorsement of note was held binding. Note, though, that court commented on fact that contract was fully executed, and brought by third party, not original party to contract.

[25]Commercial Bank of Manchester v. Nolan, 7 How. 508 (Miss. 1843) (involving charge of excessive rate of interest).

[26]13 Sm. & M. 408, 411 (Miss. 1850).

[27]*Id.* at 412. Note here the undetermined use of the word "illegal"; such ambiguity concerning this term is prevalent throughout the cases.

did not render it unenforceable. Thus, by seemingly upholding *ultra vires*, the court opened a new loophole—that of excessive powers. Later cases have been quick to take advantage of this new opening, holding that the contracts at hand were in excess of powers of the corporation, but that they were only excessive and not foreign, and thus holding that the contracts were valid and enforceable.[28]

This doctrine of "excess of powers" was used by the court until, in the recent case of *New Orleans & N. E. R. Co. v. Jemison*,[29] it threatened to work to the advantage of the *ultra vires* defense. There, the court found itself confronted with a contract which could not be said to be merely in excess of granted powers; it was clearly foreign to the purposes for which the corporation was created. The difficulty was met by declining to follow the doctrine of *Haynes v. Covington*, and holding that a corporation's *ultra vires* contract may not be repudiated by the person sued thereon after such person has accepted the benefits thereof.

There have been other methods utilized by the Mississippi court to avoid the defense. In *Southern Realty Co. v. Tchula Coöperative Stores*,[30] a case decided in 1917, the court used this language: "The rule that the power of a corporation to own land at all or in excess of its charter cannot be questioned collaterally, but only in direct proceeding instituted by the state for that purpose, has no application where the corporation is seeking the aid of the court to enable it to acquire lands which it has no power to acquire and hold." But the court held that since the corporation had had no restriction placed on its right to acquire land in its charter, that that contract was binding on the state and could not be withdrawn by the statute[31] prohibiting corporations from acquiring agricultural land in Mississippi—the court citing as authority the famous case of *Dartmouth College v. Woodward*.[32]

In *Williams v. Bank of Commerce of Memphis*,[33] the court used language to the effect that there was no set rule as to the validity or invalidity of an *ultra vires* defense, and cited cases allowing recovery not on the contract, but against the contract and on an equitable basis, as in actions *quantum meruit*. But the court then said that regardless of the theory applied, a corporation would not be allowed to repudiate its contract and still retain money received under it. The court then held that although a note given by a foreign corporation to secure a loan is void in the state where made

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[28]Littlewort v. Davis, 50 Miss. 403 (1874) (person with whom corporation deals, where not foreign to powers, cannot set up violation of franchise to avoid contract).

[29]144 Miss. 890, 110 So. 785 (1926).

[30]114 Miss. 309, 322–23, 75 So. 121, 122 (1917).

[31]Miss. Laws 1912, c. 162. This would have rendered the contract actually illegal, so that more than the ordinary doctrine of *ultra vires* was involved.

[32]17 U. S. 518 (1819).

[33]71 Miss. 858, 16 So. 238 (1894).

because of failure to fulfill statutory requirements, the corporation cannot repudiate it without returning the money borrowed. "If the contracts were invalid, and conferred no right of action on the banks, they gave no right to the company to hold the money, and, repudiating the contracts, the company, *ex aequo et bono*, was liable to repay the money it had received. . . There is a wide and marked distinction between transactions of the character here involved and those involving moral turpitude, the mere making of which is detrimental to the public welfare or private morals."[34]

There are three cases which by language uphold the doctrine, and which are the three strongest cases in Mississippi for *ultra vires*. They deserve detailed consideration.

In the earliest of the three cases, *Bacon v. Miss. Ins. Co.*,[35] decided in 1856, the court said that where it was foreign to purposes of its incorporation for a company to give its note, and no circumstances shown making the act valid, no presumption of its validity would be maintained. This case dealt with a promissory note executed by a corporation authorized to make insurance on certain kinds of property. The court said that the note was not necessary to the business of the corporation, and even went so far as to say that if a corporation contracted debts or borrowed money to pay off liabilities incurred in necessary prosecution of its business, such contracts were not within the scope of corporate power express or implied, and no recovery would be allowed. This is rather extreme language. But here the court was confronted by a plaintiff who was not an original party to the note, and who had bought the note from a since dissolved corporation. Further, the language of the court may be construed to imply that its decision only went so far as to say that no presumption of validity of such an act would be maintained, and that any circumstance shown making the act valid would allow recovery. What is meant by "valid" cannot be determined from the case. Also, there was present herein a question of agency, the decision of which completely justified the holding in the case, and upon which the court relied.[36]

The second case, *Greenville Compress & Warehouse Co. v. Planter's Compress & Warehouse Co.*,[37] dealt with a situation in which two cotton compress companies agreed to consolidate, which was *ultra vires*, and turned over their businesses to a governing

[34]71 Miss. at 868. Note that the court was attempting to apply Tennessee law; thus, this can not be accepted, as to language, as Mississippi policy. The case indicates, however, that the court was determined to grant relief of some kind.

[35]31 Miss. 116 (1856).

[36]*Id.* at 118: "If the corporation had power to execute the note, it must have been exercised by the president under the authority shown to have been given him by the board of directors. And not only does there appear to be no such authority, but it is shown by the resolutions of the board, offered by appellants to justify the execution of the note, that it was a wholly different mode of providing for the debt from that directed and resolved upon by the board."

[37]70 Miss. 669, 13 So. 879 (1893).

committee pending procurement of a charter for the new company. One of the companies determined to withdraw from the agreement and proceeded to act *contra* to it. The supreme court held it wrong for the lower court to have granted and perpetuated an injunction forbidding the dissenting company from interfering with the committee—because it, in effect, specifically executed an *ultra vires* contract, and turned over the property of defendant company to persons not parties to the suit. This seems a strong case for *ultra vires,* but might be distinguished on the grounds that actually specific performance was involved. Further, an attempt at settlement outside of court had left the court in an awkward position—which may or may not have influenced the decision. The court spoke of this factor, as it did of specific performance. Also, the court spoke of recovery being allowable on equitable grounds. On the whole, it seems that the peculiar relief granted by the lower court, and the circumstances of the case, determined the holding.

The third and latest of the three cases, *Jones v. Miss. Farms Co.*,[38] decided in 1917, held that a foreign corporation which had no charter power to make a contract for development of cut-over timber lands could not maintain a suit for breach of contract to purchase a railroad from it, ancillary to a development scheme, except as the damages were stipulated by the contract. The damages stipulated were a forfeiture of money paid and a complete annulment of contract rights upon any breach. The case is awkwardly reported; it deals primarily with liquidated damages and specific performance. The "excess of power" angle is merely tacked on at the very last of the case.[39] Indeed, the effect of the court's decision seems to have been to carry out the contract of the parties which provided for annulment of the contract and allowance of liquidated damages, in form of money already paid out, for the breach thereof. It is very difficult to see how the court could enforce the contract to the extent of giving the liquidated damages which the parties had provided for, and yet say that a reason for refusing to give unliquidated damages for breach was that the contract was *ultra vires*.[40]

While a great deal of the discussion here has dealt with cases in which the courts by language upheld *ultra vires*, let it be said that the majority of cases have not only actually denied the defense by their holdings, but have used language to denounce the doctrine.

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[38]116 Miss. 295, 76 So. 880 (1917).

[39]*Id.* at 308, 76 So. at 884. The one sentence referring to this phase of the case is at the very close of the court's opinion: "The Finkbine Co. will be precluded from maintaining suit for damages as to the development project independent of clause 11, because it had no charter power to make a contract as to the development proposition."

[40]It is to be noted here that the Mississippi Farms Company was not an original party to the contract, and was merely buyer of its contract from the foreign lumber company, and further that the foreign corporation suffered no damage for which it could sue—other than those stipulated. The Farms Company could only sue as assignee of the foreign corporation.

The Mississippi court has said in *Wade v. American Col. Soc.*,[41] decided in 1846, that only the state which granted a corporation its charter could raise the question of whether or not a corporation was exceeding powers granted by the charter. In *Wall v. Darby*,[42] in 1923, there was presented the following situation. A deed, by mistake, had described land as being in the wrong township. The deed was reformed in accordance with the prayer of the cross-bill of appellee in the case. It was insisted by appellant that appellee was not entitled to this relief because his vendor was a religious society, not authorized under laws to hold land. But the court held that though the equitable title obtained by the vendor religious society might have been a defeasible one, subject to attack by the state, yet they could convey an indefeasible title, before any such attack, by conveying to a party who could own the land. Relief was held to have been properly given. In *Middleton v. Georgetown Mercantile Co.*,[43] in 1918, the court held that even though a corporation acquired agricultural land in violation of a statute prohibiting such acquisition, the title could be questioned and assailed only by the state, through its proper officers, and not by the grantor in the deed of trust under which the corporation purchased at foreclosure sale. The court stated that the exclusive penalty for violation of this statute was dissolution of the corporation and administration of its assets, that good title had vested in the corporation by the deed under foreclosure sale, and that the grantor could not invalidate the acquisition of title as being *ultra vires*.

In *Arthur v. Commercial R. R. Bank*,[44] the court said that whether or not a corporation, with railway franchise attached to it, had power to convey away same was a matter between state and corporation and could not be inquired into by third parties. In *Grand Gulf Bank v. Archer*,[45] it was said that "It may be now regarded as settled law, that an inquiry into the violation of its charter by a bank or other corporation, can be had only in direct proceeding, instituted for the purpose by the government; and not in a collateral way by individuals." Accordingly, the court held

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[41] 7 Sm. & M. 697 (Miss. 1846). This was an early case dealing with free-negro colonization in Africa; it dealt with trust situation, and the above language was in way of dicta. The case was cited in McAllister v. Plant, 54 Miss. 106, 119 (1876). However, Mitchell v. Wells, 37 Miss. 235, 244–45 (1895), speaks of the decision in the Wade case as a "crowning error of these misconceptions of our public policy"; and holds that Lewis v. Lusk, 32 Miss. 297, 302 (1856), expressly overruled the Wade case. But here the act was contrary to laws and policy of state, *in re* slavery, as well as unauthorized by charter, and the court seemed more interested in the factual situation of slave colonization than in *ultra vires*.

[42] 132 Miss. 93, 95 So. 791 (1923).

[43] 117 Miss. 134, 77 So. 965 (1918). Note that here the court stated that the purpose of the statute involved (Miss. Laws 1912, c. 162) was to prevent corporations from buying lands for agricultural purposes, and that here no proof was made of such purposes on the part of the corporation. This left the corporation a shield against future direct attack by the state.

[44] 9 Sm. & M. 394 (Miss. 1848).

[45] 8 Sm. & M. 151, 173 (Miss. 1847).

that where the bank took more interest on a loan than it was authorized to take by its charter, that only the interest would be forfeited, the principal being recoverable. In *Nevitt v. Bank of Port Gibson*,[46] in 1846, it was held that where a corporation has a judgment of forfeiture rendered against it, trustees appointed by the court shall take over the books, collect all debts due it, sell its property and pay all creditors. The case of *Commercial Bank v. Nolan*,[47] was decided in 1843, and denied *ultra vires*, both by language and holding, to a party who attempted to hold the fruits of a contract which he at the same time sought to avoid as *ultra vires*. Eighty-three years later, in 1926, the case of *New Orleans & N. E. R. Co. v. Jemison*[48] dealt with a similar situation and applied the same law, expressly following the *Nolan* case, and denying *ultra vires*.

In *Watts Mercantile Co. v. Buchanan*,[49] the court expressed the same view which had been followed in the *Nolan* and the *Jemison* cases cited above. But the court went a step further than either of those cases: it held that even though a statute prohibited a corporation from purchasing the capital stock of another corporation, that where the defendant corporation held such stock, it would not be allowed to defeat payment by *ultra vires*. In *National Surety Co. v. Hall-Miller Decorating Co.*,[50] in 1913, the court clearly and unequivocally expressed disapproval of the doctrine. "It is the policy of the law to look with disfavor upon the defense of *ultra vires*. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice, or work a legal wrong."

Thus, from a summary of the *ultra vires* cases, it seems that the language and holdings of the majority of the cases, added to the actual holdings of the remainder, establish a pronounced tendency of the Mississippi courts to deny the defense of *ultra vires*.[51] If the language is viewed alone, our state seems only to have contributed to the confusion described by Judge Thompson in 1894; but, if the actual holdings of the Mississippi courts are checked, it is clear that we have a singularly consistent denial of the availability of the defense of *ultra vires* in the cases which have been decided in this state. After all, the language served as a mere

[46] 6 Sm. & M. 513 (Miss. 1846).
[47] 7 How. 508, 535 (Miss. 1843).
[48] 144 Miss. 890, 110 So. 785 (1926).
[49] 92 Miss. 540, 46 So. 66 (1908).
[50] 104 Miss. 626, 633, 61 So. 700, 703 (1913).
[51] For cases holding corporations liable for torts of agents, criminally liable, and liable for punitive damages, see Ala. & Vicksburg R. Co. v. Brooks, 69 Miss. 168, 13 So. 847 (1891); Williams v. Planters Ins. Co., 57 Miss. 759 (1880) (corporation, like natural person, is liable to action of trespass on the case for a malicious prosecution conducted by its officers and agents, and fact that corporation, as such, could have no malice is immaterial); Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897) (corporation held liable for the torts of its agent, where it had ratified same by its actions, and punitive damages allowed against the corporation).

safeguard, allowing flexibility in future decisions, permitting each case to be determined on its merits.

We seem, therefore, to have attained by our common law a result which many states have had to legislate to accomplish. And we have the advantage of flexibility—which nearly always insures justice, and very seldom precludes it.

Walter De Jarnette Coleman

Mississippi Rules on the Liability of Railroads to Trespassers on Their Tracks

A solution of the problems involved in a consideration of the liability of railroads to trespassers on their right-of-ways is perhaps more complex and involves more numerous factors than would at first blush appear. The difficulty arises from the attempt of the courts to apply a handful of traditional generalities, which arose in a comparatively simple agricultural society, to an extremely complex industrial and mechanical civilization. This effort to adapt static formulas to an ever-changing need and yet preserve the superficial integrity of the accepted rules or principles has resulted in a cumbersome body of law wherein language and result are likely to be at loggerheads. Our consideration is further complicated by the intervention of legislative mandates which have affected both the rules involved and the technique by which the courts apply accepted common law principles.

The legislature has, by statute, formulated certain rules which have had the effect of abrogating many of the old concepts of a landowner's liability to trespassers, or at least of modifying the application of such concepts to railroads. The most important and far-reaching of these legislative enactments is that known as the Prima-Facie Statute,[1] which provides:

> "In all actions against railroad corporations . . . using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of such engines, locomotives or cars . . . shall be prima facie evidence of the want of skill and care of such railroad corporation . . . in reference to such injury . . ."

Other statutes which have the effect of broadening the class of persons who may be granted relief and increasing the burden which defendant railroads must bear are the Comparative-Negligence Statute,[2] the Flying-Switch Statute,[3] the Train-Backing Statute,[4] and the Speed-Limit Statute.[5]

These statutes have produced great changes in the rules governing railroad injury law. They represent an attempt on the part of the legislature to regulate the operation of the machines used in modern commerce, and although they are not limited in their scope to trespasser situations, yet their action has encroached most sharply on the traditional immunity of landowners.

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[1] Miss. Code Ann. (1930) § 1580.
[2] *Id.* § 511.
[3] *Id.* § 6118.
[4] *Id.* § 6119.
[5] *Id.* § 6130.

In the time of the early common law the feudal lord was the sovereign of his estates. He could exclude whom he wished. Even the king himself had no right or privilege to enter the land of a lord without permission. From this state of affairs we find springing the rule that a landowner owes no duty to a trespasser except not to willfully injure him. Today we find such idea still embodied in the rule that an owner or possessor of land owes no duty to a trespasser except to refrain from *willful* or *wanton* negligence toward him, or from conduct so reckless as to be characterized as willful or wanton.[6] Although the form of the rule still persists unimpaired, the life to which it must be applied has undergone radical changes. Increased population has transformed the wilderness into thickly settled communities. The old forms of hand manufacture have given way to highly specialized factories using intricate machinery. The world is bound together by new modes of communication and travel. The inventor has made the world a more pleasant place—but paradoxically, a more dangerous place—in which to live. These and other changes have made vast shifts in the social and economic life of the world.

Because of these changed conditions and the increased emphasis placed on the value of human life, there has been a constant breaking down of the old judicial attitude toward trespassers. The common law has continued to show its adaptability to the changes which follow the modernization of civilization. But the strength of the rule of *stare decisis* is very great. An understanding of the problems is inextricably interwoven with a perception of the conflict between the landowners' traditional immunity and the expanding application of the comparatively recent ideas of negligence. The courts adhere to the old language.[7] But in doing so they make effective a degree of care much higher than that which was formerly expressed by the rule.

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[6]In Latham v. Johnson, [1913] 1 K. B. 398, 411, we find: "The owner of property is under a duty not to injure the trespasser willfully; 'not to do a willful act in reckless disregard of ordinary humanity towards him;' but otherwise a man 'trespasses at his own risk.'" The case of N. C. & St. L. Ry. Co. v. Priest, 117 Ga. 767, 45 S. E. 35, 37 (1903), tells us that a landowner is only to be held liable for conduct which amounts to a "reckless, willful, or wanton disregard of the trespasser's safety." It was said in Schiffer v. Sauer Co., 238 Pa. 550, 86 Atl. 479, 480 (1913), that the owner's only duty toward a bare licensee, who, in Pennsylvania, is said to stand in no better position than a trespasser, "was to abstain from inflicting on him an intentional, wanton, or willful injury." The rule stated in Holberg v. Collins, Lavery & Co., 80 N. J. L. 425, 428, 78 Atl. 166, 167 (1910), is thus: "As against a trespasser a malicious or intentional injury is actionable while a merely negligent act will not form the basis of recovery because the duty to observe reasonable care is not owing to a trespasser." In the same case we find: "That a defendant might reasonably have anticipated a possible injury to a trespasser plays no part in determining willfulness." *Id.* at 429, 78 Atl. at 168.

[7]The action of the courts in using the old words while changing their original meaning is criticized in Eldredge, *Tort Liability to Trespassers* (1937) 12 TEMPLE L. Q. 32.

The supreme court of Mississippi, like the courts of other jurisdictions, still states that a landowner is liable to a trespasser only for gross, willful or wanton negligence.[8] But at the same time it has changed the original meaning of the rule in order to allow recovery[9] and has used the statutory devices furnished it by the legislature to openly abrogate the older conception of liability.[10]

[8]The case of L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 639, 12 So. 957 (1892), lays down the rule thus: "Being a trespasser, the engineer's duty to her was measured by his abstention from willful or wanton negligence." Dooley v. M. & O. R. Co., 69 Miss. 648, 651, 12 So. 956 (1892), expresses it: "The railroad servants were only bound not to inflict willful or wanton hurt upon him." The rule reads: "Even trespassers on railroad tracks cannot be recklessly or wantonly injured, . . ." in So. Ry. Co. v. Pittman, 97 Miss. 416, 421, 52 So. 207, 208 (1910). The case of Fuller v. I. C. R. Co., 100 Miss. 705, 716, 56 So. 783, 785 (1911), says that "all that is required of the railroad company as against a trespasser is the abstention from wanton or willful injury, or that conduct which is characterized as gross negligence. . . ." The language used in N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 20, 61 So. 655 (1913), is that "the railroad must not wantonly or willfully injure a trespasser upon its tracks." "The only duty which appellant owed to Daniell was to abstain from inflicting upon him a willful and wanton injury." A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 374, 66 So. 730, 732 (1914). "As a general rule, a railroad is . . . required only to refrain from injuring trespassers after their position of peril is discovered." Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 484, 71 So. 752, 756 (1916). "He was a trespasser upon the track of the defendant, and the defendant owed him no duty except not to willfully or wantonly injure him after discovering his presence on the track." Hubbard v. So. Ry. Co., 120 Miss. 834, 841, 83 So. 247, 248 (1919). In I. C. R. Co. v. Ash, 128 Miss. 410, 417, 91 So. 31, 32 (1922), we are told that "deceased was a trespasser on the railroad track at the time he met his death, and, this being true, the defendant owed him no duty except not to willfully or wantonly injure him after discovering his presence on the track." The rule is said in Y. & M. V. R. Co. v. Cox, 132 Miss. 564, 571, 97 So. 7, 8 (1923), to be: "They were either trespassers or bare licensees, and the rule in both instances is the same, *viz.*, that the railroad company is only liable for injuries to bare licensees when guilty of gross, willful, or wanton negligence."

See also A. & V. Ry. Co. v. Carter, 77 Miss. 511, 27 So. 993 (1900); M. & O. Ry. Co. v. Holliday, 79 Miss. 294, 30 So. 820 (1901); Stevens v. Y. & M. V. R. Co., 81 Miss. 195, 32 So. 311 (1902); K. C., M. & B. R. Co. v. Hawkins, 82 Miss. 209, 34 So. 323 (1903); Barmore v. V., S. & P. Ry. Co., 85 Miss. 426, 38 So. 210 (1905); St. L. & S. F. R. Co. v. Moore, 101 Miss. 768, 58 So. 471 (1913); M. C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); A. & V. Ry. Co. v. Kelly, 126 Miss. 276, 88 So. 707 (1921); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926); Young v. C. & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933).

[9]K. C., M. & B. R. Co. v. Hawkins, 82 Miss. 209, 34 So. 323 (1903); Barmore v. V., S. & P. Ry. Co., 85 Miss. 426, 38 So. 210 (1905); So. Ry. Co. v. Pittman, 97 Miss. 416, 52 So. 207 (1910); Young v. So. Ry. Co., 97 Miss. 483, 52 So. 19 (1910); I. C. R. Co. v. Dillon, 111 Miss. 520, 71 So. 809 (1916); A. & V. Ry. Co. v. Kelly, 126 Miss. 276, 88 So. 707 (1921); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932); Young v. C. & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933).

[10]N. O., M. & T. R. Co. v. Toulme, 59 Miss. 284 (1881) (Speed-Limit Statute); V. & M. R. Co. v. McGowan, 62 Miss. 682 (1885) (Speed-Limit Statute); Fulmer v. I. C. R. Co., 68 Miss. 355, 8 So. 517 (1891) (Speed-Limit Statute); A. & V. Ry. Co. v. Lowe, 73 Miss. 203, 19 So. 96 (1895) (Speed-Limit Statute); Jones v. I. C. R. Co., 75 Miss. 970, 23 So. 358 (1898) (Speed-Limit Stat-

This basic rule has many corollaries which have been recognized by our court. It has been held that a railroad company owes no duty to a trespasser to keep a lookout from its locomotives or cars;[11] that it owes no duty to a trespasser to anticipate his presence;[12] that it owes no duty to a trespasser to equip its engine with a proper or effective headlight;[13] that it owes a trespasser, even though he is near a public crossing, no duty to blow its whistle or

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ute); A. & V. Ry. Co. v. Carter, 77 Miss. 511, 27 So. 999 (1900) (Speed-Limit Statute); Stevens v. Y. & M. V. R. Co., 81 Miss. 195, 32 So. 311 (1902) (Speed-Limit Statute); Y. & M. V. R. Co. v. Landrum, 89 Miss. 399, 42 So. 675 (1907) (Prima-Facie Statute); Fuller v. I. C. R. Co., 100 Miss. 705, 56 So. 783 (1911) (Prima-Facie Statute); St. L. & S. F. R. Co. v. Moore, 101 Miss. 768, 58 So. 471 (1913) (Speed-Limit Statute); Nixon v. I. C. R. Co., 103 Miss. 405, 60 So. 566 (1913) (Prima-Facie Statute, Speed-Limit Statute); N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655 (1913) (Prima-Facie Statute); Jefferson v. So. Ry. Co., 105 Miss. 571, 62 So. 643 (1913) (Prima-Facie Statute); M. C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838 (1914) (Prima-Facie Statute, Speed-Limit Statute); L. & N. R. Co. v. Garnett, 129 Miss. 795, 93 So. 241 (1922) (Speed-Limit Statute); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938) (Speed-Limit Statute, Comparative-Negligence Statute).

[11]In speaking of a demurrer to a declaration in the case of M. & O. R. Co. v. Stroud, 64 Miss. 784, 792, 2 So. 171, 172 (1887), the following words are used: "We consider the declaration to mean that the engineer in charge of the train did not see the deceased in time to stop the train before he was struck, but that he might or ought to have seen him. In this view the declaration was demurrable. It stated no cause of action." Christian v. I. C. R. Co., 71 Miss. 237, 240, 15 So. 71, 72 (1894), says that "The true rule is that the servants of the company are not bound to keep a lookout for trespassers." It is said in N. O. M. & C. R. Co. v. Harrison, 105 Miss. 18, 20, 61 So. 655 (1913), that "as to trespassers, it is not the duty to keep a lookout." In summing up the case in the last paragraph, we find the court saying: "To restate our views of this case, we think it would be straining the facts unduly to say that any sort of negligence is shown by the evidence, and, besides, if there was negligence, it consisted in the failure of the flagman to remain at his post every instant of the time to maintain a constant lookout for trespassers on the track, and even though the flagman was negligent to this extent, his negligence cannot be of any avail to the plaintiff." Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 486, 71 So. 752, 757 (1916). In this case the train was backing on the track and the flagman was stationed on the top of the caboose to keep the usual lookout ahead of the train. In Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 821, 114 So. 866, 869 (1927), we are told that "the railroad company is usually not under a duty to maintain a lookout for persons under the track unless they have a right to be on the track."

See also Howard v. L., N. O. & T. Ry. Co., 67 Miss. 247, 7 So. 216 (1890); Dooley v. M. & O. R. Co., 69 Miss. 648, 12 So. 956 (1892); So. Ry. Co. v. Pittman, 97 Miss. 416, 52 So. 207 (1910); M. & O. R. Co. v. Robinson, 132 Miss. 841, 96 So. 749 (1923); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932); Murray v. L. & N. R. Co., 168 Miss. 513, 151 So. 913 (1934).

[12]V. & M. R. Co. v. McGowan, 62 Miss. 682 (1885); M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); N. O. & N. E. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629 (1889); Dooley v. M. & O. R. Co., 69 Miss. 648, 12 So. 956 (1892); A. & V. Ry. Co. v. Lowe, 73 Miss. 203, 19 So. 96 (1895); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932).

[13]Y. & M. V. R. Co. v. Frazier, 104 Miss. 372, 61 So. 547 (1913); A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 66 So. 730 (1914); Payne, Director General v. Hamblin, 126 Miss. 756, 89 So. 620 (1921).

ring its bell or keep a lookout for the crossing;[14] that while it owes the duty to give a warning signal upon seeing an object upon its track,[15] it owes a trespasser no duty to slacken the speed of its locomotive or to stop, before the object is recognized as a human being.[16] It will be noted, however, that each of these rules finds application before the trespasser has been seen. The conclusion which one is forced to reach is that there is usually *no* duty owed to a trespasser until his presence is known to the servants of the company. This principle has been recognized by the court on numerous occasions.[17] However, as will be demonstrated later, it is believed that statutory innovations have, as a practical matter, so severely encroached on the application of the above principle as to leave it, on many occasions, as little more than a formal utterance.

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[14]G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

[15]L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 12 So. 957 (1892); Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 39 So. 601 (1932).

[16]It is said in L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 640, 12 So. 957 (1892), that "The test of responsibility is, did the striking of the child by the train occur after the engineer had seen—not *might* or *ought* to have seen—that is, *discerned* or *distinguished*, the girl? Until the girl had been seen—discerned to be a human being—the engineer was under no obligation to the trespasser to check or stop his train, whatever may have been his obligation to the passengers who were being hauled by him." In Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 489, 71 So. 757, 758 (1916), a verdict for the plaintiff was reversed and judgment rendered for the defendant, the court saying: "He [the engineer] gave the alarm whistle when the unknown object was at first detected. The object did not move at the alarm, and the engineer, of course, could not appreciate the necessity of stopping his train until he discerned that the object was at least probably a human being."

[17]It is stated in Dooley v. M. & O. R. Co., 69 Miss. 648, 651, 12 So. 956, 957 (1892), as: "The appellee owed the appellant no duty until he was seen by its servant in charge of the moving car. . ." In N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 20, 61 So. 655 (1913), we are told that "By a long line of decisions this court has held to the doctrine that the railroad owes *no* duty to a trespasser until his peril is discovered." It is said in A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 367, 66 So. 730, 732 (1914), that "As Daniell was a trespasser upon appellant's railroad track, its employees owed him no duty to keep a lookout, and in fact owed him no duty at all unless and until he was seen by them in a position of peril." The language used in Hubbard v. So. Ry. Co., 120 Miss. 834, 841, 83 So. 247, 248 (1919), is this: "He was a trespasser upon the track of the defendant, and the defendant owed him *no duty except not to willfully or wantonly injure him after discovering his presence* on the track." (Italics supplied). The language in I. C. R. Co. v. Ash, 128 Miss. 410, 417, 91 So. 31, 32 (1922), is very similar to that in the Hubbard case: ". . . deceased was a trespasser on the railroad track at the time he met his death, and, this being true, the defendant owed him *no duty except not to willfully or wantonly injure him after discovering him* on the track." (Italics supplied).

But the language in M. & O. R. Co. v. Robinson, 132 Miss. 841, 847, 96 So. 749 (1923), is somewhat different: ". . . as he was a trespasser on its tracks, *the only duty which the engineers owed him was to exercise reasonable care to prevent striking him after discovering he was on the track.*" (Italics supplied). "The railroad company owes no duty to a trespasser until his pres-

There is one admitted exception to the rule that a landowner owes no duty to a trespasser until his presence is known to the owner. This is stated in the *Restatement of Torts* as follows:[18]

> "A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety."

The court may give effect to this exception by calling a trespasser a licensee.[19] In doing so it is ostensibly retaining the symmetry of a static doctrine while at the same time permitting a recovery where formerly prohibited. By narrowing the class of persons to whom the rule is applicable, the court finds it unnecessary to broaden the rule itself. On the other hand, the court may expressly adhere to the exception as here:[20]

> "The court instructed for the plaintiff that if the jury believed from the preponderance of the evidence . . . that at the time he was struck by the train the said Carson

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ence is discovered. . ." I. C. R. Co. v. Mann, 137 Miss. 819, 828, 102 So. 853, 854 (1925).

See also M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 71 So. 752 (1916); Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932); Murray v. L. & N. R. Co., 168 Miss. 513, 151 So. 913 (1934).

We sometimes find the rule stated in this manner: "Until made aware of the presence and peril of the trespasser, there could not be willful or wanton misconduct toward the unrecognized, undiscerned trespasser." L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 641, 12 So. 957 (1892).

[18]RESTATEMENT, TORTS (1934) § 334.

[19]M. & O. R. Co. v. Roberts, 23 So. 393, 394 (Miss. 1898). In this case the court held that the plaintiff was so plainly guilty of contributory negligence, in venturing on the trestle with no attempt to ascertain whether any train was in the vicinity, that he was not entitled to recover, but we find this language in the opinion: "There was evidence tending to show that the railroad and trestle over Sowashee creek was used as a footway by persons coming into Meridian on foot from the south, and that the railroad officials had not protested against such use, nor had had for many years any warning board at the trestle against its use as a footway." And these further words: "As the jury might have found from the evidence that the use of the railroad tracks across the trestle as a footway made the deceased and others using such track licensees for the crossing of said trestle, it was the duty of the railroad company to give such licensees warning of the approach of its engines and trains . . ."

In speaking of the action of the court in sustaining a demurrer to the amended declaration in Young v. So. Ry. Co., 97 Miss. 483, 486, 52 So. 19, 21 (1910), the supreme court said: ". . . taking into consideration the whole declaration, a case of negligence is sufficiently stated, making the railroad company liable if the facts stated are sustained by the proof. Under the allegations the infant was more than a mere licensee . . ." In speaking of the deceased in the case of I. C. R. Co. v. Dillon, 111 Miss. 520, 524, 71 So. 809, 811 (1916), it was said: "He was an invited licensee."

[20]G. & S. I. R. Co. v. Bond, 179 So. 355, 360 (Miss. 1938).

> Bond was standing, sitting, or walking on the main line of the defendant, at a place where the employees of the train could and did see him, *or should have seen him if keeping a proper lookout on entering a much frequented place used by the general public, without blowing the danger signal, or making any effort to avoid striking him,* then they would find a verdict for the plaintiff." (Italics supplied).

Mere failure to take steps to prevent trespasses cannot usually confer a license on trespassers. Neither can the failure of the injured person to object to or prevent the wrong give the color of right to the subsequent wrongdoing of the actor. A railroad company—indeed, any possessor of land—is not bound at his peril to make his land intruder-proof. The very nature of a railroad right-of-way makes exclusion of trespassers impossible. But the failure to exclude, even though possible, would fail to justify a reasonable man in believing that he is welcome to enter. Certainly no benefit can accrue to the company from such intrusions. Furthermore, if the trespasser is injured, the company is liable to suit. Such suits are expensive although the company is eventually[21] absolved from liability, which is far from a certainty in this state.[22]

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[21]In the 59 Mississippi cases used in the preparation of this note, 40 cases were submitted to the jury. In only four cases did the jury return a verdict for the defendant, two of which were verdicts on a factual situation showing the defendant to be guilty of no negligence. Hamlin v. Y. & M. V. R. Co., 72 Miss. 39, 16 So. 877 (1894); Hubbard v. So. Ry. Co., 120 Miss. 834, 83 So. 247 (1919). One of these verdicts was properly based on the then effective doctrine of contributory negligence, the court saying: "Unless the doctrine of contributory negligence is to be abolished entirely, this verdict must be approved." Nichols v. G. & S. I. R. Co., 83 Miss. 126, 140, 36 So. 192, 193 (1903). The final verdict for the defendant was reversed by the supreme court on the ground of erroneous instructions. Christian v. I. C. R. Co., 71 Miss. 237, 15 So. 71 (1894).

[22]On the appeal of the 59 cases mentioned in note 21, *supra,* to the supreme court, 32 opinions favorable to the plaintiff were rendered. Of these 32 decisions, 18 were final in their nature, ending the litigation as to the defendant's liability, while 14 held that there was error in the trial below, necessitating a new trial. Of these 14 cases which were remanded, 12 were appealed by the plaintiff from a peremptory instruction granted to the defendant by the lower court, one was an appeal from the action of the lower court in sustaining the defendant's demurrer to the plaintiff's amended declaration, and one was an appeal from a verdict for the defendant which was reversed for erroneous instructions to the jury.

In these cases, the court rendered 27 opinions favorable to the defendant, of which 15 were final in their nature. 12 cases were remanded for a new trial for error below. In each of these cases a verdict had been rendered for the plaintiff.

Thus we find that the plaintiff has had a slight numerical advantage over the defendant. But we must also bear in mind that this advantage will be increased by the re-trial of the 26 cases which were reversed and remanded. In 13 of the cases reversed and remanded on plaintiff's appeal the jury had rendered no verdict on the evidence, while in all of the 12 cases reversed on the appeal of the defendant, a jury had already returned a verdict for the plaintiff. In only one of the cases had a verdict been found for the defendant. The predilection of the jury in the plaintiff's favor has already been shown in

We are forced to the conclusion that, while the railroad *may* so conduct itself that the public will become licensees for the purpose of crossing its tracks at a given point,[23] the court often calls trespassers or tolerated intruders licensees in order to allow recovery and at the same time pays its respects to an ancient rule. The language is not decisive. The criterion by which to determine the plaintiff's position is the objective test of what a reasonable man would believe to be the state of mind of the possessor of the land.[24]

But while no duty is owed to a trespasser before his presence is known, the court is uniform in its holding that a duty to him arises upon the receipt of such knowledge.[25] This duty has been expressed in conflicting language in the various opinions of the court. Some cases hold that the servants of the company must only refrain from willful and wanton injury to such trespasser,[26] while others tell the reader that the duty is to use reasonable care

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note 21, *supra*, and of itself shows that the plaintiff must receive much the better of the defendant upon the re-trial of these cases.

[23]In Forno v. P. R. Co., 234 Pa. 538, 83 Atl. 406 (1912), such a situation might be said to have arisen. Over a period of years the company, while repairing a high board fence along the right-of-way, had never failed to leave an opening through which ran a well defined path across the tracks. In Pomponio v. N. Y., N. H. & H. R. Co., 66 Conn. 528, 34 Atl. 491 (1895), the railroad company had put down planks for the convenience of certain factory employees in crossing the track. This may be the proper explanation of the case of I. C. R. Co. v. Dillon, 111 Miss. 520, 71 So. 809 (1916), but there was no showing in that case that the railroad either placed the planks or consented to their being so placed.

[24]RESTATEMENT, TORTS (1934) § 330, comment *d*.

[25]Jamison v. I. C. R. Co., 63 Miss. 33 (1885); M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); N. O. & N. E. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629 (1889); L., N. O. & T. Ry. Co. v. Cooper, 68 Miss. 368, 8 So. 747 (1891); M. & O. R. Co. v. Watly, 69 Miss. 145, 13 So. 825 (1891); L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 12 So. 957 (1892); Christian v. I. C. R. Co., 71 Miss. 237, 15 So. 71 (1894); M. & O. R. Co. v. Holliday, 79 Miss. 294, 30 So. 820 (1901); Turner v. Y. & M. V. R. Co., 33 So. 283 (Miss. 1903); K. C., M. & B. R. Co. v. Hawkins, 82 Miss. 209, 34 So. 323 (1903); So. Ry. Co. v. Pittman, 97 Miss. 416, 52 So. 207 (1910); N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655 (1913); A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 66 So. 730 (1914); Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 71 So. 752 (1916); Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916); Hubbard v. So. Ry. Co., 120 Miss. 834, 83 So. 247 (1919); Campbell v. G., M. & N. R. Co., 126 Miss. 438, 89 So. 1 (1921); I. C. R. Co. v. Ash, 128 Miss. 410, 91 So. 31 (1922); M. & O. R. Co. v. Robinson, 132 Miss. 841, 96 So. 749 (1923); I. C. R. Co. v. Mann, 137 Miss. 819, 102 So. 853 (1925); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); Young v. C. & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933); Murray v. L. & N. R. Co., 168 Miss. 513, 151 So. 913 (1934).

[26]M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 12 So. 957 (1892); M. & O. R. Co. v. Holliday, 79 Miss. 294, 30 So. 820 (1901); K. C., M. & B. R. Co. v. Hawkins, 82 Miss. 209, 34 So. 323 (1903); N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655 (1913); Hubbard v. So. Ry. Co., 120 Miss. 834, 83 So. 247 (1919); I. C. R. Co. v. Ash, 128 Miss. 410, 91 So. 31 (1922); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926).

to prevent injury to the known intruder.[27] However a careful study of the opinions which make the defendant liable only for a willful or wanton wrong will show that the courts interpret this phrase very liberally. If the court wishes to impose liability for an injury caused by mere negligence, it may say that the defendant's acts amounted to willful, wanton, or reckless conduct under the circumstances.[28] In other words, what is willful misconduct is made a question of fact in each particular case. The court, through the elasticity of this formula, may consider the case at bar on its own merits and render a decision in accordance therewith and at the same time lend a symmetrical appearance to the decisions which would be impossible under a rigid construction of the formula. The conflict between the cases is not as real as casual consideration would indicate.[29]

In determining whether or not the defendant has breached its duty after discovering the presence and peril of the trespasser, the

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[27]Jamison v. I. C. R. Co., 63 Miss. 33 (1885); N. O. & N. E. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629 (1889); L., N. O. & T. Ry. Co. v. Cooper, 68 Miss. 368, 8 So. 747 (1891); M. & O. R. Co. v. Watly, 69 Miss. 145, 13 So. 825 (1891); Christian v. I. C. R. Co., 71 Miss. 237, 15 So. 71 (1894); Turner v. Y. & M. V. R. Co., 33 So. 283 (Miss. 1903); So. Ry. Co. v. Pittman, 97 Miss. 416, 52 So. 207 (1910); A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 66 So. 730 (1914); Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 71 So. 752 (1916); Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916); Campbell v. G., M. & N. R. Co., 126 Miss. 438, 89 So. 1 (1921); M. & O. R. Co. v. Robinson, 132 Miss. 841, 96 So. 749 (1923); I. C. R. Co. v. Mann, 137 Miss. 819, 102 So. 853 (1925); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); Young v. C. & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933); Murray v. L. & N. R. Co., 168 Miss. 513, 151 So. 913 (1934).

[28]K. C., M. & B. R. Co. v. Hawkins, 82 Miss. 209, 213, 34 So. 323 (1903), tells us that: "From the evidence, the jury must have thought that he did see, and in that case the carelessness was 'so gross as to be tantamount to design.'"

N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655 (1913); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926).

[29]In the cases in note 28, *supra*, the court imposed liability upon the defendant under the "willful and wanton" rule.

In the following cases, the court refused to impose liability upon the defendant under the "willful and wanton" rule: M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 12 So. 957 (1892); M. & O. R. Co. v. Holliday, 79 Miss. 294, 30 So. 820 (1901); Hubbard v. So. Ry. Co., 120 Miss. 834, 83 So. 247 (1919); I. C. R. Co. v. Ash, 128 Miss. 410, 91 So. 31 (1922).

In these cases, the court imposed liability for the violation of the "reasonable care" rule: Jamison v. I. C. R. Co., 63 Miss. 33 (1885); Christian v. I. C. R. Co., 71 Miss. 237, 15 So. 71 (1894); So. Ry. Co. v. Pittman, 97 Miss. 416, 52 So. 207 (1910); Campbell v. G., M. & N. R. Co., 126 Miss. 438, 89 So. 1 (1921); I. C. R. Co. v. Mann, 137 Miss. 819, 102 So. 853 (1925); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); Young v. C. & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933).

But the court refused to impose liability while using the "reasonable care" rule in N. O. & N. E. R. Co. v. Bourgeois, 66 Miss. 3, 5 So. 629 (1889); Turner v. Y. & M. V. R. Co., 33 So. 283 (Miss. 1903); Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 71 So. 752 (1916); Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916); M. & O. R. Co. v. Robinson, 132 Miss. 841, 96 So. 749 (1923); Murray v. L. & N. R. Co., 168 Miss. 513, 151 So. 913 (1934).

actions of the company's servants are to be viewed as those of any defendant in a negligence action. It is proper for them to assume, in the absence of circumstances indicating the contrary, that an adult seen on the track is a normal person who will heed a warning given him.[30] It is presumed that such person is in possession of his faculties and will take due precaution for his own safety.[31] There is no duty on the company to slacken the speed of its train until circumstances arise that should bring to the mind of a reasonable man the reflection that the person is not a normal person or has not heard the alarm and probably will not seek his safety in due time.[32]

It is this privilege to assume normalcy in regard to an adult that distinguishes the duty of a railroad to an adult trespasser from that owed to a child trespasser.[33] Our court has said:[34]

> "Until he saw the child and her peril, he owed her no other or greater duty than that due any other trespasser whatever. Only when the engineer sees the trespasser is a child is he brought under a rule of greater care and caution."

In another case[35] we are told:

> "Of course circumstances may, and do, have something to do with the degree of care incumbent upon railroad employees after the trespasser is seen.
>
> "It is no doubt true that it would be negligent to anticipate that a child would take care of itself to the same extent as the ordinary adult would. It may not be too much to say that had the employees of the railroad company in the present case discovered the child in time to avert the accident, and had failed to make every possible effort to stop the train, they would have been guilty of a wanton wrong."

The rules governing a suit against a railroad by a trespasser are of comparative simplicity when viewed as abstract proposi-

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[30]V. & M. R. Co. v. McGowan, 62 Miss. 682 (1885); M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

[31]V. & M. R. Co. v. McGowan, 62 Miss. 682 (1885); M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); Fuller v. I. C. R. Co., 100 Miss. 705, 56 So. 783 (1911); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

[32]M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 71 So. 752 (1916); Y. & M. V. R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927).

[33]L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 12 So. 957 (1892); Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 71 So. 752 (1916); Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916).

[34]L., N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 639, 12 So. 957 (1892).

[35]Y. & M. V. R. Co. v. Smith, 111 Miss. 471, 484, 71 So. 752, 756 (1916).

tions. But when application is sought to be made of them to the conflicting testimony brought out in the trial of a case, we often find that reasonable minds may differ in the result to be reached. This conflict of testimony may be between physical facts and oral testimony. It is often found that an engineer or fireman has testified positively that he was on a lookout and that he did not see anyone on the track. Yet from the fact of the injury, the position and condition of the body of a deceased trespasser, and the nature of the surrounding terrain it may be evident that the deceased was of necessity on the track in a position where he must have been seen by a proper lookout. This being true, the court has held that since the engineer testified that he was on a lookout, the jury was warranted in disbelieving his statement that he did not see the trespasser and in finding that he was negligent to such degree as would impose liability on the company.[36] The same result has been reached by similar reasoning when there was oral testimony as to the plaintiff's position[37] or where the testimony of the servant was that he was not on a lookout, but the plaintiff introduced evidence that he was looking in the direction of the injured person.[38] But the evidence produced by the plaintiff, whether direct or circumstantial, must be in contradiction to the testimony of the engineer in order to warrant the jury in refusing the engineer's statement that he did not see the plaintiff.[39]

Limitations of space preclude a consideration of the effect of the Prima-Facie Statute on the liability of railroads to trespassers. It is sufficient to say that there is authority to the effect that a showing by any person injured that he was struck by a moving train or locomotive entitles him to a jury's consideration of his case.[40] It then becomes incumbent on the railroad defendant to introduce some evidence showing how the accident occurred.[41] Although the cases are not always clear, it appears that by the recent

[36]N. O., M. & T. R. Co. v. Toulme, 59 Miss. 284 (1881); Jamison v. I. C. R. Co., 63 Miss. 33 (1885); Harrison v. So. Ry. Co., 93 Miss. 40, 46 So. 408 (1908); N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655 (1913); A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 66 So. 730 (1914); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932).

[37]Jamison v. I. C. R. Co., 63 Miss. 33 (1885); K. C., M. & B. R. Co. v. Hawkins, 82 Miss. 209, 34 So. 323 (1903); Harrison v. So. Ry. Co., 93 Miss. 40, 46 So. 408 (1908); A. & V. Ry. Co. v. Kelly, 126 Miss. 276, 88 So. 707 (1921); Campbell v. G., M. & N. R. Co., 126 Miss. 438, 89 So. 1 (1921); I. C. R. Co. v. Mann, 137 Miss. 819, 102 So. 853 (1925); Edward Hines Yellow Pine Trustees v. Holley, 142 Miss. 241, 106 So. 822 (1926); G. & S. I. R. Co. v. Williamson, 162 Miss. 726, 139 So. 601 (1932).

[38]Jamison v. I. C. R. Co., 63 Miss. 33 (1885).

[39]Y. & M. V. R. Co. v. Huff, 111 Miss. 486, 71 So. 757 (1916); I. C. R. Co. v. Ash, 128 Miss. 410, 91 So. 31 (1922).

[40]Fuller v. I. C. R. Co., 100 Miss. 705, 56 So. 783 (1911).

[41]Nichols v. G. & S. I. R. Co., 83 Miss. 126, 36 So. 192 (1903); Y. & M. V. R. Co. v. Landrum, 89 Miss. 399, 42 So. 675 (1907); Fuller v. I. C. R. Co., 100 Miss. 705, 56 So. 783 (1911); Nixon v. I. C. R. Co., 103 Miss. 405, 60 So. 566 (1913); N. O., M. & C. R. Co. v. Harrison, 105 Miss. 18, 61 So. 655 (1913); Jefferson v. So. Ry. Co., 105 Miss. 571, 62 So. 643 (1913).

trend of authority, a railroad defendant who succeeds in showing that the plaintiff was a trespasser on its tracks and that such plaintiff's presence was not known to defendant is entitled to a peremptory instruction.[42]

The Speed-Limit Statute which was enacted to limit the speed of trains running within a municipality, is as follows:[43]

> "Any railroad company having the right of way may run locomotives and cars by steam through cities, towns and villages, at the rate of six miles an hour and no more; and the company shall be liable for any damages or injury which may be sustained by any one from such locomotives or cars whilst they are running at a greater speed than six miles an hour through any city, town or village. . . ."

More cases are found involving an injury to a trespasser while the company was violating this statute than while violating any other legislative provision.[44] The construction given this act is entirely uniform. It is held that the action of the statute is to remove the relationship of the plaintiff to the defendant from consideration.[45] If injury occurs while the statute is being violated—

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[42]In the cases of Y. & M. V. R. Co. v. Landrum, 89 Miss. 399, 42 So. 675 (1907), and Jefferson v. So. Ry. Co., 105 Miss. 571, 62 So. 643 (1913), the defendant failed to show how the accident occurred because of lack of knowledge. Liability was imposed by the court. But in the last two trespasser cases in which it was sought to invoke the operation of the statute, it was held inapplicable. M. & O. R. Co. v. Robinson, 132 Miss. 841, 96 So. 749 (1923); Murray v. L. & N. R. Co., 168 Miss. 513, 151 So. 913 (1934). In these cases the condition of the body of the deceased showed injury was inflicted by a running train. The position of the body showed deceased was a trespasser. The crews of all trains which might have caused the accident testified that the deceased was not seen and that they were unable to say whether a lookout was kept at the point in question. These cases seem to indicate the present application of the statute.

Other cases involving the statute are: Hamlin v. Y. & M. V. R. Co., 72 Miss. 39, 16 So. 877 (1894); A. G. S. Ry. Co. v. Daniell, 108 Miss. 358, 66 So. 730 (1914).

[43]This statute was amended with reference to the rate of speed allowed by the 1938 session of the legislature—the acts of which have not yet been officially published.

[44]N. O., M. & T. R. Co. v. Toulme, 59 Miss. 284 (1881); V. & M. R. Co. v. McGowan, 62 Miss. 682 (1885); M. & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171 (1887); Strong v. C., A. & N. R. Co., 3 So. 465 (Miss. 1888); Fulmer v. I. C. R. Co., 68 Miss. 355, 8 So. 517 (1891); A. & V. Ry. Co. v. Lowe, 73 Miss. 203, 19 So. 96 (1895); Jones v. I. C. R. Co., 75 Miss. 970, 23 So. 358 (1898); A. & V. Ry. Co. v. Carter, 77 Miss. 511, 27 So. 993 (1900); Stevens v. Y. & M. V. R. Co., 81 Miss. 195, 32 So. 311 (1902); St. L. & S. F. R. Co. v. Ruff, 95 Miss. 165, 48 So. 184 (1909); St. L. & S. F. R. Co. v. Moore, 101 Miss. 768, 58 So. 471 (1912); Nixon v. I. C. R. Co., 103 Miss. 405, 60 So. 566 (1913); M. C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); L. & N. R. Co. v. Garnett, 129 Miss. 795, 93 So. 241 (1922); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

[45]A. & V. Ry. Co. v. Carter, 77 Miss. 511, 27 So. 993 (1900); Stevens v. Y. & M. V. R. Co., 81 Miss. 195, 32 So. 311 (1902); M. C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); L. & N. R. Co. v. Garnett, 129 Miss. 795, 93 So. 241 (1933); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

whether the injury be to trespasser, licensee, or invitee—liability attaches if the speed of the locomotive is the proximate cause of the damage.[46] The causation question is submitted to the jury, which, as we have seen, usually results in a verdict for the plaintiff.[47] Such verdicts are usually sustained on appeal.[48] The reasoning of the court is to the effect that the unlawful speed of the train was a substantial factor in the injury, since a slower rate of speed would have precluded the train from being at the spot of injury at the moment of the accident. By eliminating the causation issue from effective consideration, the court focuses attention exclusively on the issue of whether or not the statute was violated.

A discussion of the Comparative-Negligence Statute and its effect on the type of actions here under consideration is unnecessary. Its effect is to prevent the contributory negligence of the plaintiff from acting as a bar to recovery. A good picture of its operation may be had by consideration of the case of *Gulf & Ship Island R. Co. v. Bond.*[49]

Before the enactment of the Flying-Switch Statute, our court had held that it was negligence *per se* to make a flying switch across the streets of a municipality.[50] It was further said that a trespasser, though not at one of these street crossings, might recover for the injuries caused to him by the movement of a car by flying switch over such crossing.[51] But it was held that an injury to a trespasser caused by a flying switch made in a municipality, but not made across a street crossing was not actionable.[52] Our legislature then declared by the Flying-Switch Statute that anyone—whether trespasser, licensee, or invitee—injured by such switch made within the boundaries of a municipality, whether across a street or not, might recover therefor. It likewise made similar provision by the Train-Backing Statute, for recovery by anyone

[46]N. O., M. & T. R. Co. v. Toulme, 59 Miss. 284 (1881); V. & M. R. Co. v. McGowan, 62 Miss. 682 (1885); Jones v. I. C. R. Co., 75 Miss. 970, 23 So. 358 (1898); A. & V. Ry. Co. v. Carter, 77 Miss. 511, 27 So. 993 (1900); Stevens v. Y. & M. V. R. Co., 81 Miss. 195, 32 So. 311 (1902); M. C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); L. & N. R. Co. v. Garnett, 129 Miss. 795, 3 So. 241 (1933); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

[47]See note 21, *supra*. N. O., M. & T. R. Co. v. Toulme, 59 Miss. 284 (1881); A. & V. Ry. Co. v. Lowe, 73 Miss. 203, 19 So. 96 (1895); A. & V. Ry. Co. v. Carter, 77 Miss. 511, 27 So. 993 (1900); M. C. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); L. & N. R. Co. v. Garnett, 129 Miss. 795, 93 So. 241 (1922); G. & S. I. R. Co. v. Bond, 179 So. 355 (Miss. 1938).

[48]See cases in note 47, *supra*, and Stevens v. Y. & M. V. R. Co., 81 Miss. 195, 32 So. 311 (1902).

[49]179 So. 355 (Miss. 1938).

[50]Fulmer v. I. C. R. Co., 68 Miss. 355, 8 So. 517 (1891); A. & V. Ry. Co. v. Summers, 68 Miss. 566, 10 So. 63 (1891).

[51]See cases cited in note 50, *supra*.

[52]Dooley v. M. & O. R. Co., 69 Miss. 648, 12 So. 956 (1892).

[53]A. & V. Ry. Co. v. Jones, 73 Miss. 110, 19 So. 105 (1895); Pulliam v. I. C. R. Co., 75 Miss. 627, 23 So. 359 (1898); I. C. R. Co. v. McCalip, 76 Miss. 360, 25 So. 166 (1899); Y. & M. V. R. Co. v. Metcalf, 84 Miss. 242, 36 So. 259 (1904).

injured by a train backing into or along a passenger depot at a greater rate of speed than three miles per hour. While no trespasser cases involving either of these statutes have been decided by the court since their enactment, various licensee cases indicate that their application must be parallel to that of the Speed-Limit Statute.[53]

C. Sidney Carlton

RECENT DECISIONS

JOINT TORTFEASORS—INDEMNITY—RES ADJUDICATA.

Claimant sought indemnification against the defendant railroad for damages which the former had been compelled to pay in a prior collision suit. The plaintiff in the collision action was a passenger in a bus which the claimant company had insured against liability. The bus collided with a locomotive which defendant had stopped across a highway on a rainy night and caused the injury which formed the basis of the original suit. In this prior action the original plaintiff sued both the bus company and the present defendant. She was successful against the bus company, but her action against the defendant was dismissed. In the present suit the claimant insurance company, having discharged the liability of the bus company sought indemnity from the railroad. HELD: The judgment in the original suit exonerating the defendant from liability was *res adjudicata*. *Central Surety & Ins. Corp. v. Miss. Export R. R. Co.*, 91 F. (2d) 125 (C. C. A. 5th, 1937).

This case raises the question as to the effect of a former judgment in a subsequent suit between codefendants. Most courts hold that parties to a judgment are not bound by it in a later controversy between themselves, unless they were adversary parties in the original action.[1] But method of alignment is not infrequently disregarded in determining whether parties occupied the position of adversaries. To the extent that the defendant's rights or obligations *inter se* depend on their rights and obligations toward the original plaintiff, the judgment determining the latter is binding upon codefendants in a subsequent action between themselves.[2] The prior judgment is given this effect on the ground that the defendants in the former action, though nominally on the same side, were in fact adversaries as to the facts actually adjudicated between them. The extent to which the prior adjudication is binding depends on how many of the issues in the two suits are regarded as identical. Hence the former judgment may in some instances establish nothing but the

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[1]Victor Oil Co. v. Drum, 184 Cal. 226, 193 Pac. 243 (1920); Renfro v. Hanon, 297 Ill. 353, 130 N. E. 740 (1921); Bakula v. Schwab, 167 Wis. 546, 168 N. W. 378 (1918). See dissenting opinion in Lumberman's Mut. Casualty Co. v. Bissell, 220 Mich. 352, 190 N. W. 283 (1922); 1 FREEMAN, JUDGMENTS (5th ed. 1925) 918.

[2]U. S. Fidelity & Guaranty Co. v. Haggart, 163 Fed. 801 (C. C. A. 8th, 1908); Boston & M. R. R. v. Sargent, 70 N. H. 299, 47 Atl. 605 (1900); Fulton Co. Gas & Elec. Co. v. Hudson River Tel. Co., 200 N. Y. 287, 93 N. E. 1052 (1911).

Where the liability of parties arises from the same transaction, the advantages of determining it in one action have given rise to the practice of allowing one defendant to give notice to a third person to defend the suit. When this is done the suit will be binding on the notified party in a suit between him and the defendant, as though they had been codefendants. Washington Gaslight Co. v. District of Columbia, 161 U. S. 316 (1896); Otis Elevator Co. v. Maryland Casualty Co., 95 Colo. 99, 33 P. (2d) 974 (1934); Liberty Mut. Ins. Co. v. George Colon & Co., 260 N. Y. 305, 183 N. E. 506, *aff'd*, 235 App. Div. 117, 256 N. Y. Supp. 628 (1933); Riggs v. N. J. Fidelity & Plate Glass Co., 126 Ore. 404, 270 Pac. 479 (1928). Where no such notice was given, some courts hold the prior judgment is *prima facie* evidence of the issues therein adjudicated. Snyder v. U. S. Fidelity & Guaranty Co., 119 Okla. 280, 249 Pac. 422 (1926).

Whether the defendant in the second suit was a codefendant in the prior

defendant's liability or non-liability to the original plaintiff,[3] it may be binding on the parties in the second suit only as to certain issues,[4] or it may be conclusive as to material facts so as to determine the outcome of the second suit.[5]

A number of difficulties are apparent in the application of these principles to indemnity suits between joint tortfeasors. Where the indemnitor and indemnitee were charged with negligence in the injured plaintiff's action, the indemnity suit is usually brought on the theory that the indemnitor's negligence was the active and inducing cause of the accident while the indemnitee was only passively negligent.[6] Although the doctrine of *res adjudicata* is applied so as to bar the claimant's indemnity suit in some cases, more often the courts say that the essential elements of the claimant's suit were not adjudicated in the prior action. In such cases the prior suit is conclusive as to any fact therein litigated, but the claimant must introduce more evidence to show that defendant was primarily at fault.[7] In some cases the claimant in the suit-over shows that the "last clear chance" doctrine is applicable as between himself and the defendant.[8] In other cases the claimant produces no additional evidence entitling him to indemnity and consequently his suit fails.[9]

The cases seem to agree that it is immaterial that the parties were on the same side of the suit, so long as issues relating to their liability *inter se* were in fact litigated. It has been asserted in justification of this stand taken by the courts that when one party has had sufficient incentive to introduce evidence as to certain issues in the original action, there is no reason for allowing him to consume the court's time with a repetition of the same evidence. The argument has also been interposed that upon the issue of the liability of each of the defendants to the plaintiff the other defendants were adversely interested, because in exonerating one the court would place a heavier burden on the other. This line of reasoning is adopted in the prin-

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suit, or whether he had only been given notice and an opportunity to defend, the prior adjudication concludes him only to matters actually put in issue, and not as to matters that might have been adjudicated, but in fact were not. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845 (1906).

[3]Westfield Co. v. Noblesville & Eagletown Gravel-Road Co., 13 Ind. App. 481, 41 N. E. 955 (1895).

[4]Central of Georgia Ry. Co. v. Macon Ry. & L. Co., 140 Ga. 309, 78 S. E. 931 (1913); Johnson v. Atl. Coast Line R. Co., 142 S. C. 125, 140 S. E. 443 (1927); See Gulf, C. & S. F. Ry. Co. v. Galveston, H. & S. A. Ry. Co., 83 Tex. 510, 18 S. W. 956 (1892).

[5]Central Surety & Ins. Corp. v. Miss. Export R. R. Co., 91 F. (2d) 125 (C. C. A. 5th. 1907); Seattle v. Erickson, 99 Wash. 543, 169 Pac. 985 (1918). See Kansas City v. Mullins, 200 Mo. App. 639, 209 S. W. 558 (1919), where a city statute provided for adjudication as to primary negligence in the original plaintiff's action.

[6]Portland v. Citizen's Tel. Co., 206 Mich. 632, 173 N. W. 382 (1919); Scott v. Curtis, 195 N. Y. 424, 88 N. E. 794 (1909); see City of San Antonio v. Smith, 94 Tex. 271, 59 S. W. 1109 (1900).

[7]Colorado & S. Ry. Co. v. Western L. & P. Co., 73 Colo. 107, 214 Pac. 30 (1923); Knippenberg v. Lord & Taylor, 111 Misc. 427, 183 N. Y. Supp. 72 (1920).

[8]Colorado & S. Ry. Co. v. Western L. & P. Co., 73 Colo. 107, 214 Pac. 30 (1923), cited note 7, *supra.*

[9]Knippenberg v. Lord & Taylor, 111 Misc. 427, 183 N. Y. Supp. 72 (1920), cited note 7, *supra.*

cipal case which seems to place some emphasis upon the fact that each defendant offered in defense that the injuries were caused by the sole negligence of the other.[10]

But how can it be said that the prior suit adjudicated issues between defendants, when all the evidence therein was admitted or rejected only as it tended to defeat or support the original plaintiff's cause of action? A Wisconsin court[11] criticizes the application of the doctrine of *res adjudicata* in actions between defendants who are joint tortfeasors. In such cases, the court says, the liability of each party to every other party grows out of an entirely different state of facts. One defendant in the original suit has no control over the proceedings so as to allow him to exhaust the question of another defendant's liability; hence no rights between codefendants can be determined. Perhaps the argument of this case is not without merit, in spite of the fact that it was modified by a later case.[12] However, it must be admitted that the application of the *res adjudicata* doctrine in many cases obtains a just result and acts as a time-saving device for the court.

How could a procedure be adopted which would retain the advantages of the present system without having its objectionable results? Some jurisdictions have attempted to do this by legislative enactment.[13] These statutes allow the defendants to enter cross-claims one against another in the original plaintiff's action.[14] Besides saving time and expense such legislation eliminates the danger of binding parties by a determination of facts which were never in issue between them. Furthermore, it prevents injustice from being

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[10]"Ordinarily a plaintiff's case is not to be embarrassed by such cross contention between the defendants, and they are not concluded. But here each defendant was allowed to assert that the other was originally and solely negligent, and so far as appears no evidence was excluded that would show the negligence of the railroad company." Central Surety & Ins. Corp. v. Miss. Export R. R. Co., 91 F. (2d) 125 (C. C. A. 5th, 1937).

[11]Bakula v. Schwab, 167 Wis. 546, 168 N. W. 378 (1918). Here the action was for contribution, but the same problem of the effect of the prior suit is involved in both contribution and indemnity actions.

[12]Wait v. Pierce, 191 Wis. 202, 210 N. W. 822 (1926).

[13]Generally, recovery against the indemnitor cannot be had by cross-petition in the action by the person injured unless this is permitted by statute. Davis v. Boone Co. Deposit Bank, 25 Ky. L. 2078, 80 S. W. 161 (1904). But in Austin Elec. R. Co. v. Faust, 63 Tex. Civ. App. 91, 133 S. W. 449 (1911), cross-action was allowed without reference to statute. Other cases hold that where two wrongdoers are made codefendants, the one secondarily liable may have judgment over against the other without being forced to a separate action. Fort Worth v. Allen, 10 Tex. Civ. App. 488, 31 S. W. 235 (1895); Polytechnic v. Redmon, 217 S. W. 730 (Tex. Civ. App. 1919).

[14]Under WIS. STAT. (1925) § 260.19, relating to interpleading parties, and § 263.15, relating to proceedings between defendants, the courts are enabled to call in new parties, to mould pleadings, and to dispose of all issues germane to the main controversy whether they arise between the plaintiff and defendants or only between the defendants. Wait v. Pierce, 191 Wis. 202, 210 N. W. 822 (1926).

Ontario Judicature Act, c. 88, § 15(d), ONT. REV. STAT. (1927) p. 907.

See a suggested statute, GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS (1927) 167: "Any party to the action, appearing in any manner, may file and litigate a claim or claims for damages or contribution or for both against any other party or parties to the action, no matter how such parties claimed against have appeared in the action."

done one defendant where the original plaintiff pleads against the other defendant in a half-hearted manner.[15] It is difficult to see how the original plaintiff is greatly embarrassed by the claimant's cross-litigation, if he is allowed to retire from the action to execute his several judgment whenever it becomes final, leaving the defendants to continue the action between each other or to appeal on the cross-action.[16] Even if the original plaintiff is inconvenienced, it is possible that the advantages of determining the rights of all parties in one action more than counteract the disadvantages.

Mary Carruthers Gholson

JURORS—ACTION AGAINST MUNICIPALITY—COMPETENCY OF TAXPAYER FOR JURY SERVICE.

Plaintiff, while attending a football game in Jackson, Miss., fell from the top row of the stadium when a plank slipped from its place. He brought this suit against the city to recover for his alleged injuries. Plaintiff challenged for cause all jurors who were residents of the city of Jackson. The trial judge sustained the objections, and the jury was made up of jurors living outside the city limits. HELD: A taxpayer of the city is not, *per se*, disqualified from jury service in a suit to which the city is a party. Judgment recovered by the plaintiff in the lower court was not reversed, however, since it appeared that the jurors before whom the case was tried were fair and impartial. *City of Jackson v. McFadden*, . . . Miss. . . , 177 So. 755 (1938).

No one would doubt that a taxpayer would be a competent juror where the state is a party to the litigation. And the majority of courts for practical reasons would probably hold the taxpayer a competent juror in a case wherein the county is a party to the suit.[1] However, many courts still adhere to the old common law rule,[2] and hold that a taxpayer in a municipality is not competent to sit as a juror when the municipality or city is a party to the suit.[3]

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[15]The possibility of fraud and collusion is not discussed by the courts where no evidence is offered regarding it. However, a plaintiff might easily be induced to plead in a listless manner against one defendant when he felt reasonably certain of obtaining a judgment against another.

[16]This is allowed by the Wisconsin court: "From the common-law point of view this practice is anomalous but it follows logically from the practice of combining the two actions. The court may change mere rules of practice fixed by mere precedent when the situation requires it in the interest of justice . . . And the plaintiff, having recovered a judgment satisfactory to her, ought not to be subjected to the expense and jeopardy of a new trial merely to enable the defendant to try out issues existing between themselves." Scharine v. Huebusch, 203 Wis. 261, 234 N. W. 358 (1931).

[1]Fountain County v. Loeb, 68 Ind. 29 (1879); Wilson v. Wapello County, 129 Iowa 77, 105 N. W. 363 (1905); Eastman v. Bd. of Com'rs of Burke County, 119 N. C. 505, 26 S. E. 39 (1896) (action to recover lands from the county); Martin v. Somervell County, 21 Tex. Civ. App. 308, 52 S. W. 556 (1899) (practical difficulty would be encountered since it would necessitate a change of venue).

[2]Hesketh v. Braddock, 3 Burr. 1847, 97 Eng. Rep. 1130 (K. B. 1766); City of London v. Wood, 12 Mod. 669, 88 Eng. Rep. 1592 (1701).

[3]Hearn v. Greensburgh, 51 Ind. 119 (1875); Albion v. Hetrick, 90 Ind. 545 (1883); Johnson v. City of Waterloo, 140 Iowa 670, 119 N. W. 70 (1909);

The basis for this holding seems to be that the juror is interested in the outcome of the litigation. The theory of a trial by jury is that the jurors shall stand absolutely indifferent between the parties litigant, that they shall be as free from interest or prejudice as it is humanly possible to be. The object of the law is to procure impartial, unbiased persons for jurors; they must be "*omni exceptione majores.*"[4] An interest, though small and remote, will disqualify the juror; and numerous authorities have held that a verdict against the city which might impose additional burdens upon all the taxpaying residents constitutes such interest.[5]

On the other hand there is a respectable line of authorities which agree with the instant case and hold that a taxpayer is a competent juror in a suit wherein that municipality is a party. Cases reaching this result declare that the interest of the taxpayer as such is too remote and uncertain to disqualify him. In the earliest case found in which the municipal corporation was sued and the taxpayer was held competent as a juror, it was pointed out that the taxpayer himself may even sue the corporation and recover a judgment against it, even though his own property may indirectly and remotely pay a portion of it. Such an interest is so remote that it could not affect in any way his judgment as a juror.[6] One year later the Kentucky court independently reached the same result.[7] Reasons for the decisions were aptly expressed as follows:

> "If in a prosecution for the violation of a city ordinance the citizen is to be excluded as a juror by reason of his interest fines could not be imposed where the party is entitled to a jury. The courts of the city alone have jurisdiction in such case, and the same line of argument would exclude the judge from presiding and the sheriff from summoning the jury. The result of the litigation may lessen or increase the tax, but all are injured or benefitted in proportion to the amount owned. If the taxes are increased, each citizen must bear his proportion of the burden; and if lessened, all derive the benefits. It is a common interest slight, and often remote; and in such cases to decide the citizen incompetent as a juror would conduce to defeat the ends of justice."[8]

Broadway M'fg. Co. v. Leavenworth, 81 Kan. 616, 106 Pac. 1034 (1910); Fulwiler v. City of St. Louis, 61 Mo. 479 (1876); Diveny v. City of Elmira, 51 N. Y. 506 (1873); Portland v. Kamm, 5 Ore. 362 (1874); Watson v. Tripp, 11 R. I. 98 (1874).

[4]Diveny v. City of Elmira, 51 N. Y. 506, 509 (1873).

[5]Albion v. Hetrick, 90 Ind. 545 (1883); Diveny v. City of Elmira, 51 N. Y. 506 (1873); Garrison v. Portland, 2 Ore. 123 (1865); Portland v. Kamm, 5 Ore. 362 (1874).

For extension of this rule see Russell v. Hamilton, 3 Ill. 56 (1839) (inhabitants of the township were not allowed to sit on the jury in an action by the commissioner of school lands upon a note for use of that township). Nonresident taxpayer is also disqualified. Kendall v. City of Albia, 73 Iowa 241, 34 N. W. 833 (1887); Broadway M'fg. Co. v. Leavenworth, 81 Kan. 616, 106 Pac. 1034 (1900).

[6]Omaha v. Olmstead, 5 Neb. 46 (1877).

[7]Kemper v. City of Louisville, 14 Bush 89 (Ky. 1878).

[8]*Id.* at 95.

Since then it has been held by numerous decisions that the slightest interest, personal or private, will disqualify a prospective juror; but the mere fact that taxes of a citizen will have to be increased or lessened, by reason of the litigation, will not disqualify him.[9] The interest meant is a pecuniary interest; that is, such an interest as is capable of being valued by a pecuniary standard. The slightest interest is sufficient, provided it be immediate, and not remote and contingent. Even though the interest of a taxpayer is too remote to operate as a disqualification,[10] it is proper to exclude him when he states that his interest as a taxpayer might influence his verdict.[11]

Several states[12] have passed statutes abrogating the old common law rule and setting forth specifically that taxpayers shall not be barred from the jury in suits against or by the municipality,[13] or county,[14] for that reason alone.

The Mississippi ruling is in accord with these decisions.[15] In fact the decision in the instant case would appear on first thought to be as rigid as the statutes mentioned above but actually the court seems to have hit inadvertently upon a more proper solution. The Mississippi statute[16] gives a wide

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[9]Anderson v. Wilmington, 22 Del. 485, 7 Atl. 204 (1907) (overruling prior decisions of the same court); City of Pikeville v. Riddle, 191 Ky. 231, 230 S. W. 37 (1921) (suit for diverting water upon the land of the plaintiff); City of Oklahoma City v. Meyers, 4 Okla. 685, 46 Pac. 552 (1896) (personal injury action resulting from fall into excavation); City of Marshall v. McAllister, 19 Tex. Civ. App. 159, 43 S. W. 1043 (1898) (action to recover damages for death of man caused by defective bridge); Davey v. City of Zanesville, 11 Wis. 628, 87 N. W. 813 (1901) (resident suffered injury due to defective condition of the sidewalk).

See also City of Dallas v. Peacock, 89 Tex. Civ. App. 58, 33 S. W. 220 (1895), where the statute provided that: "No judge shall sit in any case in which he shall be interested." The court held that a judgment against the city would not in any way affect primarily the judges, except upon two contingencies: first, that the city council had not already levied the taxes to the limit of their power; and, second, that they may order an increased levy in order to pay the judgment.

[10]Detroit v. Detroit Ry. Co., 134 Mich. 11, 95 N. W. 992 (1903); Sheridan County v. Davis, 61 N. D. 744, 240 N. W. 867 (1922); Ward v. City of Florence, 144 S. C. 76, 142 S. E. 48 (1928).

[11]Omaha v. Cane, 15 Neb. 657, 20 N. W. 101 (1884).

[12]*E.g.*, FLA. GEN. LAWS (1929) § 4451(4); KAN. GEN. STAT. (1935) § 43-139 (taxpayer incompetent to serve as juror where city is sued); MO. STAT. (1929) § 8776; PA. STAT. (1936) tit. 17, §§ 1172–73.

[13]Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238 (1892); Board of Public Instruction v. First Nat. Bank, 11 Fla. 1, 143 So. 738 (1932); Cartersville v. Lyon, 69 Ga. 577 (1882); Wichita Water Co. v. City of Wichita, 98 Kan. 256, 158 Pac. 49 (1916); City of Cape Girardeau v. Hunge, 314 Mo. 438, 284 S. W. 471 (1926); Hildreth v. City of Troy, 101 N. Y. 234, 4 N. E. 559 (1886) (charter of the city of Troy, N. Y.).

[14]O'Brien v. Vulcan Iron Works, 7 Mo. App. 257 (1879).

[15]The court refused to reverse case on this ground alone which seems very fair and sensible. For decisions *contra* to this see: Hildreth v. City of Troy, 101 N. Y. 234, 4 N. E. 559 (1886) (ground for reversal if not selected in accordance with the law); City of Scranton v. Gore, 124 Pa. 585, 17 Atl. 144 (1889) (question is not whether the party received a fair trial, but whether the jury was selected in accordance with the law).

[16]MISS. CODE ANN. (1930) § 2030: ". . . but any juror shall be excluded, if the court be of the opinion that he cannot try the cause impartially, and the exclusion shall not be assigned for error."

discretion to the trial judge and would seem to allow him to do indirectly what he cannot do directly. The court could very easily be of the opinion that a taxpayer would not try the case impartially. In most instances his decision will not be questioned since it appears that the action of the lower court should not be disturbed unless it appear that the complaining party did not have a fair and impartial trial, or an abuse of the trial judge's discretion be shown.[17]

There is a material difference between the effect which might be produced upon the minds of a taxpayer of a large city and a taxpayer of a small municipality. The taxpayer of a small municipality would be able to see more clearly a direct burden on him if a judgment was rendered against the city. The fact that the city was the plaintiff or the defendant might have considerable weight in influencing the verdict of a juror. Such taxpayer might be inclined to find for the plaintiff city where such city would profit to the extent of recovering a money judgment against the defendant. Where the suit is for a small amount the taxpayer would probably take little cognizance of it, but where the suit involved a large amount of money, the taxpayer would be more than trivially interested.

Each of these factors might be taken into consideration by the trial court, which would then be deciding the question of qualification of the taxpayer with a view to the facts of the particular case before it.

Nugent Shands

SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE OBTAINED BY TAPPING WIRES—CONSTRUCTION OF PRESENT FEDERAL STATUTE.

Federal officers secured evidence of defendant's activities in smuggling alcohol by tapping wires and intercepting conversations. Under a federal statute providing that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents,"[1] *etc.*, defendant objected to the admission of all evidence secured by wiretapping. Lower court held the evidence admissible on the grounds that the statute did not expressly make such evidence inadmissible when obtained by federal officers, and that the previous decision of the Supreme Court in *Olmstead v. U. S.*[2] would therefore control. HELD: Case reversed, evidence secured by tapping wires inadmissible. *Nardone v. U. S.*, 58 Sup. Ct. 275 (1937).

The Fourth Amendment, which applies only to the Federal Government and not to the state,[3] guarantees that people shall be secure in "their persons, papers, and effects, against unreasonable searches and seizures." Under this Amendment, the Supreme Court has stated as a general rule that one's house, or office, cannot lawfully be searched without a warrant, except as an incident

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[17]City of Oklahoma City v. Meyers, 4 Okla. 686, 46 Pac. 552 (1896) (an abuse of trial judge's discretion might be shown in instant case where city of Jackson was very large and amount involved was relatively small).

[1]48 STAT. 1103 (1934), 47 U. S. C. A. § 605 (Supp. 1936).

[2]277 U. S. 438 (1927).

[3]Burdeau v. McDowell, 256 U. S. 465 (1921).

to a lawful arrest therein.[4] And unless the search is conducted according to this rule, all evidence obtained thereby is inadmissible.

But two limitations as to the application of this Amendment have been announced. (1) The guaranty of freedom extended by the Amendment pertains to the search of a store, dwelling house, or other structure in respect to which a proper official warrant may be issued, but not to the search of an open field, ship, motor boat, wagon, or automobile.[5] The reason is that in the latter instance it would often be impractical to secure a warrant because the vehicle could be safely moved away before the warrant could be obtained. (2) In *Olmstead v. U. S.*[6] the Court declared that the Amendment had no application to any evidence obtained by tapping wires on the basis that the Amendment covered only searches and seizures of material, tangible objects, and not to an intangible thing like words being transmitted over a telephone wire. Resting on such distinction, letters and telegrams are accorded the protection of the Fourth Amendment,[7] while telephone conversation is not. Consequently, since no Constitutional right was involved, and no federal statute governed, the Court in the *Olmstead* case held that the common law rule that the manner of procuring evidence, whether through illegal or merely unethical means, has no effect upon its admissibility,[8] would prevail.

In the instant case the question was whether the words "no person" in the statute should be construed to include federal officers. While admitting the existence of the canon that general words of a statute do not include the government, or affect its rights unless such construction be clear and indisputable upon the text of the act,[9] the Court held such principle inapplicable in the present case.[10]

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[4]Boyd v. U. S., 116 U. S. 616 (1886); Weeks v. U. S., 232 U. S. 383 (1914); Silverthorne L'br. Co. v. U. S., 251 U. S. 385 (1920); Gouled v. U. S., 255 U. S. 298 (1921); Agnello v. U. S., 269 U. S. 20 (1925).

[5]Hester v. U. S., 265 U. S. 57 (1924); Carroll v. U. S., 267 U. S. 132 (1925).

[6]277 U. S. 438 (1927).

[7]*Ex parte* Jackson, 96 U. S. 727 (1877). Much discussion has arisen concerning this distinction. See especially the dissenting opinion of Justice Brandeis in the Olmstead case, *supra* note 2. The following articles deal with this point: Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1; Black, *An Ill-Starred Prohibition Case* (1929) 18 GEO. L. J. 120. See Wigmore, Note (1928) 23 ILL. L. REV. 377, and Note (1928) 27 MICH. L. REV. 78. See also (1928) 77 PA. L. REV. 139; (1928) 15 VA. L. REV. 62.

[8]Adams v. New York, 192 U. S. 585 (1904); 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2183.

[9]Dollar Sav. Bank v. U. S., 86 U. S. 227 (1873); U. S. v. Herron, 87 U. S. 251 (1873); U. S. v. American Bell Tel. Co., 159 U. S. 548 (1895); U. S. v. Stevenson, 215 U. S. 190 (1909); Title Guaranty & S. Co. v. Gurantee Title & R. Co., 174 Fed. 385 (C. C. A. 3d, 1909); BLACK, INTERPRETATION OF LAWS (2d ed. 1911) 94; MAXWELL, INTERPRETATION OF STATUTES (Bridgman's 7th ed. 1929) 117.

[10]The court cites the following cases as sustaining its position: U. S. v. Arizona, 295 U. S. 174 (1892). *Cf.* Stanley v. Schwalby, 147 U. S. 508 (1893); Donnelley v. U. S., 276 U. S. 505 (1927).

The Court speaks of the attempt made in Congress to cope with the problem,[11] and draws therefrom the conclusion that Congress must have meant to include this evidence within the statute. It would seem however that such slight indication of the intent of Congress as may be found would show that Congress did not propose to change the rule in the *Olmstead* case. The factor which seems to have influenced the Court most greatly was its attitude that wire-tapping amounted to a moral wrong, and therefore should not be permitted. Thus Justice Roberts, in concluding the decision, says: "For years controversy has raged with respect to the morality of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong."[12]

Actually, the answer to the problem of admissibility of evidence secured by tapping wires would seem to depend on policy, and the attitude of the Court toward such practice.[13] The decision here is rested exclusively upon the question of construction of a statute, and it is easy to dismiss it with that explanation. However, it is hardly denied that the Court could with little difficulty have reached an opposite conclusion and followed the *Olmstead* case if it had been so inclined.

On principle, the present case cannot be said to overrule the *Olmstead* case. However, it does represent a change in attitude toward the policy behind allowing the practice of wire-tapping by federal agents. The most significant feature of the present case is its final result. Prior to this decision, evidence obtained by federal officers by tapping wires was admissible, but now such evidence is inadmissible. Whether the change in the Court's attitude has become so great that it would, if necessary, overrule the holding in the *Olmstead* case on the Constitutional aspects of the admissibility of the evidence is a question of interesting speculation, but hardly susceptible of a definite answer.

L. A. Wyatt

VOLUNTARY NONSUIT—MOTION FILED AFTER COURT HAS STATED INTENTION OF GRANTING PEREMPTORY INSTRUCTION FOR DEFENDANT.

At close of evidence defendant moved for peremptory instruction. When the court stated it would grant this motion, plaintiff asked for a voluntary nonsuit. Request refused and peremptory instruction given for the defend-

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[11]Following the decision in the Olmstead case, Congressional committees investigated the wire-tapping activities of federal agents. In 1933 an act (Department of Justice Appropriation Act of March 1, 1933, 47 STAT. 1371, 1381, c. 144) was passed forbidding this method of procuring evidence of violations of the National Prohibition Act. The present statute is a part of the Federal Communications Act [47 U. S. C. A. § 605 (Supp. 1936)].

[12]58 Sup. Ct. at 277.

[13]Holmes, J., dissenting in the Olmstead case, 277 U. S. at 470, said: "We have to choose, and for my part I think it a less evil that some criminals should escape than the government should play an ignoble part." *Cf.* the following statement made by Sutherland, J., dissenting in the instant case, 57 Sup. Ct. at 279: "My abhorrence of the odious practices of the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category is to lose all sense of proportion."

ant. HELD: Plaintiff entitled to voluntary nonsuit. *Hill v. Johnson-Cone Brick Co.*, . . . Miss. . . . , 177 So. 520 (1937).

Under the early English law and practice, a plaintiff could take a nonsuit after a verdict against him and had a right voluntarily to discontinue or dismiss his action after an adverse decision, but such leave could not be granted after a general verdict.[1] The method of gaining a nonsuit in England at common law was to fail to appear or to leave the court and thus automatically be granted the nonsuit.[2] In cases tried before the court and without a jury a plaintiff might become nonsuited at any time before the judge announced his decision.[3] The injustice of this practice brought modifications of the rule by acts of Parliament and the court rules and orders thereunder, so that the rule came to be that the plaintiff at no stage had an absolute right to a nonsuit, and the question of whether or not it should be granted rested in the discretion of the court.[4] The general rule came to be that a plaintiff had the right to a voluntary nonsuit any time prior to final submission to the jury in case of trial by jury, or until pronouncement of judgment in courts of equity.[5]

Where a directed verdict has been obtained by the defendant, it is generally held that the plaintiff has lost his opportunity to ask for a voluntary nonsuit. The courts do not agree at all, however, as to when the verdict has become sufficiently final to extinguish plaintiff's right to the nonsuit. An extreme view is taken by some courts which declare that it is necessary for the jury formally to return the verdict before it is entered and the plaintiff's right is lost;[6] others declare that the jury need only to have retired in order to reach the verdict which they have been directed to return.[7] Many courts, however, feel that the directed verdict may become binding without any action on the part of the jury and that after the court's decision plaintiff's opportunity for a nonsuit has been lost.[8] There are differences of opinion as to whether it is necessary for the court to sign an order granting the motion for directed verdict or to make a peremptory instruction as given[9] and as to

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[1]9 R. C. L. 194, § 5; citing Keat v. Barker, 5 Mod. 208, 87 Eng. Rep. 612 (1696); Washburn v. Allen, 77 Me. 344, 346 (1885).

[2]Murphy v. Donlan, 5 Barn. & C. 178, 180 Eng. Rep. 66 (1826).

[3]Outhwaite v. Hudson, 7 Exch. 123, 155 Eng. Rep. 883 (1852).

[4]Robinson v. Chadwich, 7 Ch. D. 878 (1878); Stahlschmidt v. Walford, 4 Q. B. D. 297 (1879).

[5]For a collection of statutory and judicial authority both in England and the United States see Note (1934) 89 A. L. R. 13.

[6]Oppenheimer v. Elmore, 109 Iowa 196, 80 N. W. 307 (1899); Vertrees v. Newport News & M. V. Ry. Co., 95 Ky. 314, 25 S. W. 1 (1894); Chicago, *etc.*, Ry. Co. v. Metalstaff, 101 Fed. 769 (C. C. A. 8th, 1900); Gassman v. Jarvis, 94 Fed. 603 (C. C. D. Ind. 1899).

[7]Mason Hotel & Investment Co. v. Haile, 71 Fla. 469, 71 So. 520 (1916) (necessary that the jury retire from the bar for the plaintiff to be restrained from taking the nonsuit after the instruction for defendant has been given).

[8]Dobkins v. Dittmers, 76 N. J. L. 235, 69 Atl. 1013 (1908). Court had instructed jury peremptory for defendant; also holding that a directed verdict is equivalent to jury consideration which is merely a matter of formality in such case.

[9]Pisel v. Incorporated Town of Mt. Vernon, 99 N. W. 568 (Iowa 1904). Motion for directed verdict had been granted but not actually signed by the court when plaintiff asked for the nonsuit. Court refused plaintiff the nonsuit and stated that a jury's consideration was merely a formality. Turner

whether entry of the court's action must have been made part of the record.[10] The majority of the cases hold that a mere intimation on the part of the trial court that it would sustain a motion for directed verdict without final action is not binding and that the plaintiff may still demand a nonsuit.[11] There are a number of authorities, however, which disagree with this view, some of which have gone so far as to hold that plaintiff's right to a nonsuit is lost from the time defendant filed a motion for a directed verdict.[12]

The courts likewise disagree as to the reasons justifying such rulings. Those states which refuse to allow the plaintiff to take a nonsuit after defendant's motion for a directed verdict base their decision on the grounds that to do so would be the equivalent of allowing plaintiff to withdraw at all times when he found that the case would not be held in his favor. This would result in putting the defendant at a great disadvantage in that the plaintiff might continually harass him until he was able to find some judge who would agree with his views.[13] Other states base their decisions on the interpretation of their statutes as to the legal meaning of the word "submission" in

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v. Pope Motor Co., 79 Ohio St. 153, 86 N. E. 651 (1908). Court had announced its conclusions on defendant's motion for directed verdict and refused to allow the plaintiff to then dismiss. Illinois Central Ry. Co. v. Seibald, 160 Ky. 139, 169 S. W. 610 (1904). After court had granted directed verdict for defendant and while the foreman of the jury was in the act of signing the verdict, the plaintiff has lost his right to a nonsuit. Chicago, M. & St. P. Ry. Co. v. Metalstaff, 101 Fed. 769 (C. C. A. 8th, 1900). Motion for directed verdict had been granted but not actually signed nor had the jury retired from the court room when plaintiff asked for a nonsuit. Court granted nonsuit.

[10]Morrisey v. Chicago & N. W. Ry. Co., 80 Iowa 314, 45 N. W. 545 (1890). Court stated it would grant defendant's motion for directed verdict, but no entry had been made on the calendar nor any direction given. Court stated that there had been no final submission as required by statute and allowed plaintiff to take the nonsuit.

[11]Daube v. Kuppenheimer, 272 Ill. 350, 112 N. E. 61 (1916) (court was making oral statement that defendant's motion for directed verdict would be granted when plaintiff moved for the nonsuit); Oppenheimer v. Elmore, 109 Iowa 196, 80 N. W. 307 (1899) (court indicated it would grant defendant's motion for directed verdict but no entry had been made on the docket nor had any instructions been given to the jury); Vertrees v. Newport News & M. V. Ry. Co., 95 Ky. 314, 25 S. W. 1 (1894); Brackin v. McGannon, 137 Tenn. 207, 192 S. W. 922 (1917) (court suggested that it was of opinion motion of defendant for directed verdict would be granted, when plaintiff moved for nonsuit); Adams v. St. Louis, S. E. Ry. Co. of Texas, 137 S. W. 437 (Tex. Civ. App. 1911); Hall v. Chess & Wymond Co. of Ark., 151 Ark. 36, 198 S. W. 525 (1917); Colorado Fuel & Iron Co. v. Menapose, 16 Colo. App. 200, 64 Pac. 584 (1901); Arpy v. Iowa Brick Mfg. Co., 150 Iowa 455, 130 N. W. 393 (1911).

[12]Codgill v. Whiting Mfg. Co., 212 Fed. 658 (C. C. A. 4th, 1914), where federal court sitting in N. C. held that when motion for directed verdict for defendant had been made, too late for plaintiff to take a voluntary nonsuit. But see Barrett v. Virginia, 244 Fed. 397 (C. C. A. 4th, 1917), and Parks v. Southern Ry. Co., 143 Fed. 276 (C. C. A. 4th, 1906), which held in Va. and in N. C. that the plaintiff should elect whether to take the nonsuit at the time of the making of the motion for directed verdict.

[13]Note (1913) Ann. Cas. 1913D 525, 528 citing: Washburn v. Allen, 77 Me. 344, 346 (1885); McCurdy v. Mather, Kirby 273 (Conn. 1787); Meador v. Dollar Sav. Bank, 56 Ga. 605 (1876); Savoni v. Brashear, 46 Mo. 345 (1870); Sharpe v. Sowers, 152 N. C. 379, 67 S. E. 1003 (1910); Newton v. Singlob, 5 Pa. Co. Ct. 151 (1885); Kidd v. McCracken, 134 S. W. 839 (Tex. Civ. App. 1910).

regard to the placing of the cause in the hands of the jury.[14] Other states hold that a grant of a motion for a directed verdict is merely equivalent to a jury's consideration and that it is useless procedure to require the jury to retire.[15]

The Mississippi court has changed back and forth more than once, and it is possible to find cases within the state supporting most of the rules enumerated above. Thus, the court first took the view that a plaintiff was not entitled to a nonsuit after a peremptory instruction for the defendant had, in fact, been granted.[16] In the next case the court stated that the trial judge might, within his discretion, allow the plaintiff to take a nonsuit even though he had announced his intention of granting a peremptory instruction for the defendant.[17] On suggestion of error the court reiterated its statement that the plaintiff might take a voluntary nonsuit, declaring this time that it was a matter of absolute right and not within the discretion of the court.[18] In the next case the court went so far as to hold that where a peremptory instruction for the defendant has been actually given but the jury had not retired when the plaintiff in open court asked for the nonsuit, the nonsuit should have been given plaintiff.[19] But later the court changed its position and affirmed its first ruling in a case which held that the plaintiff did not have the right to be nonsuited after the instruction for the defendant had, in fact, been granted.[20] In a late case the court has again shifted its position in holding that the plaintiff may suffer a nonsuit at any time before the jury retires,

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[14]Pisel v. Incorporated Town of Mt. Vernon, 99 N. W. 568 (Iowa 1904); Illinois Central Ry. Co. v. Seibald, 160 Ky. 139, 169 S. W. 610 (1914); Mason Hotel v. Haile, 71 Fla. 469, 71 So. 520 (1916); Daube v. Kuppenheimer, 272 Ill. 350, 112 N. E. 61 (1916); Oppenheimer v. Elmore, 109 Iowa 196, 80 N. W. 307 (1899).

[15]Dobkins v. Dittmers, 76 N. J. L. 235, 69 Atl. 1013 (1908); Illinois Central Ry. Co. v. Seibald, 160 Ky. 139, 169 S. W. 610 (1914).

[16]Schaffer v. Deemer Mfg. Co., 108 Miss. 256, 66 So. 736 (1914). Peremptory instruction had been granted for defendant when plaintiff asked for a nonsuit. Plaintiff's request was denied, and the court stated that at this state the cause stood in the same light as if submitted to a jury and a verdict returned.

[17]Gulf & Ship I. Ry. Co. v. Williams, 109 Miss. 549, 68 So. 776 (1915). Court had announced its ruling to grant defendant's motion for peremptory instruction resting in his lap. The peremptory instruction had not actually been signed when plaintiff asked for the nonsuit, and the court stated that the request for the nonsuit should have been granted. This case really decided that a nonsuit is not a judgment from which an appeal may be brought, so that all language as to the right of a plaintiff to suffer a nonsuit is dicta.

[18]Gulf & Ship I. Ry. Co. v. Williams, 109 Miss. 429, 69 So. 215 (1915).

[19]Edwards v. Yazoo & M. V. R. Co., 112 Miss. 791, 73 So. 789 (1917). Peremptory instruction for defendant had been marked "given" by the court and "given and filed" by the clerk before the court had reconvened after the noon hour and before the jury had returned to the box. Plaintiff was allowed the nonsuit since the jury had not retired. Much reliance was placed upon the statute, now MISS. CODE ANN. (1930) § 594, which provides that "every plaintiff desiring to suffer a nonsuit on trial shall be barred therefrom unless he do so before the jury retire to consider of its verdict."

[20]Gooch v. Coleman, 143 Miss. 447, 109 So. 18 (1926). Court had announced its decision to grant defendant's motion for peremptory instruction but no instruction had been marked "given", when plaintiff asked for a voluntary nonsuit. Court refused to grant plaintiff's request.

though the court has orally announced its decision and judgment, if the court has done nothing further.[21] And with this holding, the principal case is, of course, in accord.

The current view of the court seems to be, therefore, that the jury must actually retire with the peremptory instruction before plaintiff's right to a nonsuit has become extinguished. But the court has declined expressly to overrule the earlier cases which seem inconsistent, and it is distinctly possible that the pendulum may swing in the direction of these cases again. From the standpoint of policy, it seems advisable to require the plaintiff to move for his nonsuit before or concurrently with a motion by the defendant for a peremptory instruction. To allow plaintiff to wait until he has seen how the court is going to rule on the question is unfair to the defendant. Perhaps it would be best to reach this result by amending the statute.

Dan Shell

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[21]Welch v. Kroger Gro. Co., 177 So. 41 (Miss. 1937). Court was in the act of granting to the defendant a motion for a directed verdict, but before the motion could be properly entered, plaintiff had a right to take a nonsuit. This was declared to be true even though the court has orally announced its decision and judgment, if nothing further has been done by the court.

BOOK REVIEWS

THE FOLKLORE OF CAPITALISM. By Thurman W. Arnold. New Haven: Yale University Press. 1937. Pp. 393. $3.00.

There is a town in the state of Wyoming by the name of Laramie which brings to mind the pioneering age that dealt in buffaloes, Indian war whoops, and the great open spaces. Toward the turn of the 19th century there came to light in Laramie, one Thurman W. Arnold, who inculcates the ruggedness of covered wagon days. But looking about him, he failed to find the war paint or the buffalo, and believing it necessary to give expression to his Quixotic desire for crusading, he has directed an attack against a newer menace—one that threatens to destroy utterly the American way of doing things. This newer menace is what the present administration has taught us to refer to as "economic royalism."

The campaign began in 1935 with the publication of "Symbols of Government." This book merely outlined the general plan of attack. In this second installment of memoirs (now being reviewed) our warrior takes the public into the early skirmishing and guerrilla raiding of the first few days of battle; and describes, when the smoke clears sufficiently, some of the events occurring in the front line trenches. Of course, at this stage, it is difficult to predict victory. We understand that both sides have resorted to prayer and that a Mr. Sherman will have much to do with the final outcome.

Much of the gas and smoke that should have been left on the battle field has been brought into the book. The material presented seems to defy classification or interpretation; appears to be inconsistent and conflicting, and is certainly devoid of any plan. Amusing are chapter headings which are veritable essays in themselves as though Fielding were beginning another episode in the life of Tom Jones. There seems to be no starting or stopping, and the book may be read at random with the same advantage as going about it page by page. The last chapter contains twenty four italicized generalities after the fashion of the horn-book and the *Restatement*, and the illustrative material that follows seems to reach about the same level of stratification. At times, in reading the book, one is led to believe that he is Alice in Wonderland, especially when a duck is proved to be a horse. At other times, one feels as though he is on the great trek with Gulliver—when the author, in commenting on his own views, says that they are neither true nor untrue. But, substantially, the book seems to be the equivalent of what the stork would bring in were it possible to cross-fertilize the notions of the Honorable James Farley and Aristotle. Tempting then is the desire to dismiss the book with a word: nothing but sophistry, or nominalism, or modern realism; but now that the philosopher has become king with his recent appointment as Special Assistant to the Attorney General, and with reviewers heralding the book as the greatest thing that has happened since Machiavelli, Darwin, Bentham, Marx and Engels, it behooves us, the intellectual and economic peasantry, to speculate on whether or not our leader will be more the philosopher, or more the king,[1] or only a traveling salesman.

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[1]Lerner, *The Shadow World of Thurman Arnold* (1938) 47 YALE L. J. 687. With the appearance of Mr. Lerner's excellent critique, there is nothing further that needs to be said.

The admitted purpose of the book is to diagnose the "present difficulties that have come upon us now that the industrial feudalism is no longer protecting large groups of our citizens who demand security, and with trying to explain the idealogical difficulties which prevent the creating of organizations which will give that protection." To develop this purpose Mr. Arnold wastes no time with historical sources or growth, nor is he concerned with capitalism in the sense of definition or justification. He does not attempt to show which demands of society are to be recognized and protected or possibly limited and denied. Dust is raised only on that side of the arena where stands the door marked "idealogical difficulties."

The method followed is after the fashion of the bear who "went over the mountain to see what he could see." Literally, Mr. Arnold takes peeks at society; he gazes forth in front, then to each side, and back over his shoulder (and if anyone is anxious to know which shoulder, it seems to be definitely the *left*). Faithful to the method, Mr. Arnold describes what he sees. The light waves that impinge upon his retina show him society living within and by virtue of organizations, which stretch all the way from the Friday Afternoon Sewing Circle to the Federal Government. Attached to these organizations is a folklore—a set of principles arrived at by an exercise of reason. One's knowledge of society is gotten by the little pictures which arise in his mind from looking at the folklore rather than by looking at what is happening. A cross-section of the folklore (not at all exhaustive) dealt with in the book would include the following myths: freedom of speech, press, or contract; *laissez faire*; that a corporation is an individual; that when the Government spends the funds are public, but when A. T. & T. spends, the funds are private; that it is honest to cheat the Government; that the Government should balance its budget or else go bankrupt; that charges made by the Government are taxes, whereas charges levied by a utility are a return for services rendered; that if the Government floats a bond issue posterity will suffer, but if Insull milks the mid-west only those will suffer who ought to suffer by selecting a worthless investment; that if the Government does anything it involves graft, patronage, and inefficiency; that the Community Chest may make assessments and distribute to the poor in the name of charity, but if the Government does so it is a dole and undermines the individual; and finally, many of our difficulties arise because we think in terms of personal private property, when it isn't personal or private or property. After the discovery of these two elements in society—the organization and folklore—the next step is to show how they interact. At times, of course, the two may bed together pleasantly, but eventually a definite social need arises, which may be filled by a new organization, but the presence or the work of the new group cannot be accommodated to the folklore. If the need is illegal, the organization will form and exist *sub rosa*. If the better class of right thinking people are questioned about illegal activities, they point to the folklore from whence come their little pictures of society. The statutes which abolished the liquor traffic illustrate this idea. Appetites remained and to fill the need came the bootlegger. To explain the bootlegger we developed a sub-folklore—something about the inherent right of the individual to sleep in the gutter.

A further illustration of the interplay between folklore and society is found in the Anti-Trust laws. For many years we have condemned, in a

symbolic sense, monopoly or big business because it makes for restraint of trade and arbitrary business practices. This folklore eventually crystallized in what we call the Sherman Act. To counter-balance this idea, however, is the need for mass production of quality merchandise at a low price. So the interpretation of the Sherman Act attempted to reflect the conflicting ideals, resulting in the use of the word "reasonable" which made possible the Garantuan enterprises that clutter up the current economic scene.

Most effective is the treatment of the corporation and of our creed that in business the corporation is just a big little man, and that what it does is no more than when neighbor Jones goes out to swap a horse with neighbor Smith. This has given to the corporation the protective devices intended for the flesh and blood individual. In similar vein is the "ritual of corporate reorganization." Even big business at times acquires an unbalanced budget despite expert bookkeeping and finds it necessary to throw itself upon the mercies of Section 77B. No one is quite sure what happens then. It is somewhat similar to a Democratic National Convention. There are protective committees, trustees, receivers, caucuses, and bankers biding their time around a table. Folklore describes the event as an individual who needed to be rehabilitated by the judicial process; what has happened has been a terrific struggle for power—and the winning group moves in and takes control.

Frequently, the history of medicine is called on for better illustrations. There was a time when medicine had a folklore and was divided into schools, somewhat like Democracy, Fascism and Communism. When one needed a doctor, he called on one who believed in the right principle. When quinine and its healing qualities were discovered the right principle for curing people was bleeding. Hence quinine remained under a taboo for years, not because it cured, but because it didn't fit the folklore. Yet it is difficult to consider Mr. Arnold as serious when he emulates the bedside manner of the doctor. There is still a debate, merely on principle, in regard to birth control and certain social diseases. Not long ago, a dentist claimed that he had discovered a new de-sensitizer and the profession immediately divided into hostile groups merely on the basis of principle. Of greater import is the struggle now going on in the ranks of organized medicine as to whether or not there should be a socialization of the practice. Pending is an action to oust a doctor who is active as such a practitioner.

By way of contrast to the confusion arising because of idealogical difficulties, we are shown many times how things get done when folklore is nonexistent or at a minimum. So the doctor muddles along in a practical sort or way in treating ailments. Then, the English and the Swedes, faced with the same economic crisis, skipped through in a hard-headed, common-sense fashion and overcame depression in a flash. In America Mr. Arnold points to a class of social workers, armed with slide rule and microscope, who go about getting the essential facts of life in a practical, everyday, fact-minded fashion. Yet this seeing, feeling, smelling approach may be valuable only if we take account of several things. First, we would have to agree that there exists such a thing in social phenomena as a fact and that we can distinguish between fact and opinion; second, we would have to agree that the facts so collected are the only relevant facts, or else our scientist may be omitting the

H in H_2O; third, we must remember that social data is collected only in reference to some purpose. The social worker who tabulates that there is in New York a vice area or that out in the rural sections lives an individual of color with ten children and an income of $250 annually has accomplished nothing unless these facts may take life in some purpose that underlies the statistics. Facts in and of themselves do not organize or establish,[2] and are usable only in reference to a principle. Indeed, were it not for folklore, this current brand of social worker wouldn't have a job.

It may be said that what the book seems to do is to describe in vivid colors what lawyers have become familiar with under the title of "law in books and law in action." At least the material amply illustrates the precision in the statement, "the law must be stable but it cannot stand still." Any picture of law would show at least two forces at work. One adheres to the beaten path; the other finds expression in the overhauling and remaking of legal materials. In those phases of societal growth where change is rapid there is always a distance between principle and practice. In a notable way law is traditional and "social psychologic pressure" requires considerable cumulation before it is felt. A program, calling not only for description but also for an evaluation of new claims and demands and for a means of making those selected immediately congruent with principle, should not involve gloating, but rather the scholarly aid and research of both psychologist and philosopher. It is doubtful whether Mr. Arnold gets beyond descriptive diagnosis unless a remedy may be found in the words "political dynamics" and the twenty-four tables. But here we find a continuation of homage to the practical, a belief in the immediacy of principles, and in the importance placed upon the advantage to be gained by seizing the awards of the day. This seems to be neither the rational approach of the philosopher nor the brute power of the king, but rather the rank opportunism of the traveling salesman. At least, before the high priest of political dynamics converts us all, we should remember that there are practical difficulties as well as idealogical difficulties.

Such is the position of the warrior from the great open spaces. True, he advocates in a measure to "shoot first and talk later" but his weapon is only a "gray goose quill." Gone is the war paint; gone is the Colt 44; gone is the buffalo. This is what happens to the rugged individual whose mental adolescence occurs in flowering but effete New England.

*David Meade Field**

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[2]Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697.

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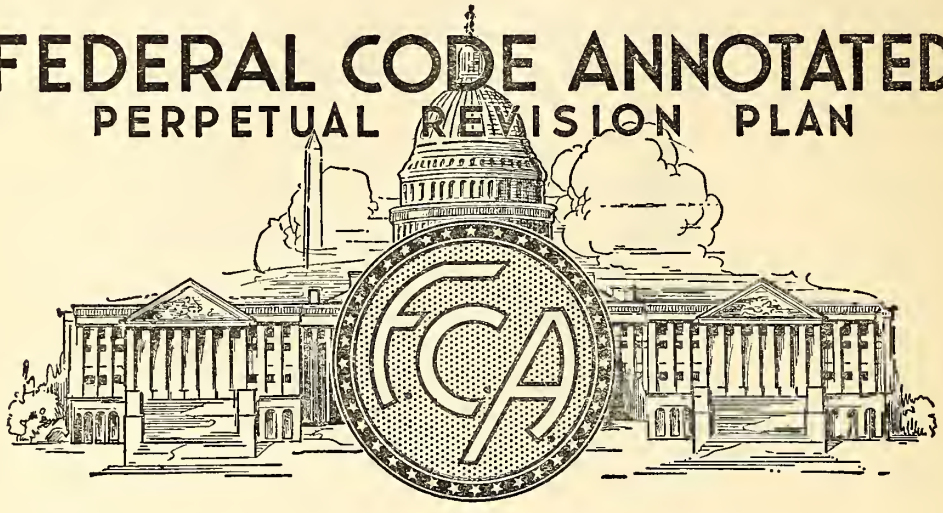

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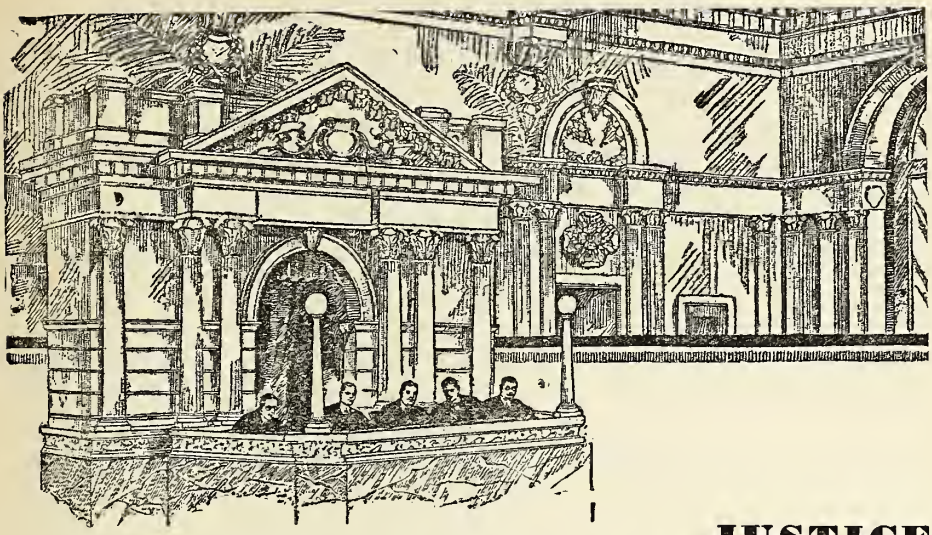

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